CORPORATE PERSONALITY

F. Hallis

Published on demand by
UNIVERSITY MICROFILMS
University Microfilms Limited, High Wycomb, England
A Xerox Company, Ann Arbor, Michigan, U.S.A.

O EX PARTE

VERSITY
RY

* * *

This is an authorized facsimile of the original book, and was produced in 1971 by microfilm-xerography by University Microfilms, A Xerox Company, Ann Arbor, Michigan, U.S.A.

* * *

K
.H16

CORPORATE PERSONALITY

A Study in Jurisprudence

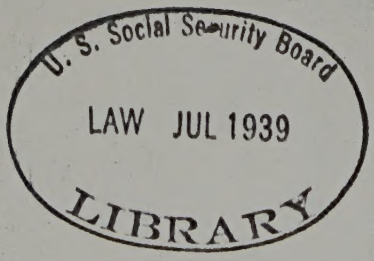
BY

FREDERICK HALLIS

M.A., D.PHIL. (OXON.)

AND OF THE INNER TEMPLE

BARRISTER-AT-LAW



OXFORD UNIVERSITY PRESS

LONDON: HUMPHREY MILFORD

1930

K656 .H355 1971

OXFORD UNIVERSITY PRESS
AMEN HOUSE, E.C. 4
LONDON EDINBURGH GLASGOW
LEIPZIG NEW YORK TORONTO
MELBOURNE CAPETOWN BOMBAY
CALCUTTA MADRAS SHANGHAI
HUMPHREY MILFORD
PUBLISHER TO THE
UNIVERSITY

V7721971
0p50469

CORPORATE PERSONALITY

Law
General Law
"Hallis"
c.2

3 JAN 19
Copy 1959

Printed in Great Britain

TO THE
MEMORY OF
PAUL VINOGRADOFF

PREFACE

FIRST among those to whom my thanks are due must stand the name of the late Sir Paul Vinogradoff, for it was at his instance that this work was undertaken. Though there will be found references to his works in the text, by far the greater part of my debt to him arises from association with his inspiring and encouraging personality itself. I need not dwell on this, for it will be understood by all those who were privileged to know him.

My profound thanks are due also to Mr. John Macmurray, Fellow of Balliol College, whose constructive and illuminating suggestions have been of the greatest assistance to me in arriving at my own conclusions; to Professor C. C. J. Webb, Professor F. de Zulueta, Dr. A. J. Carlyle, Dr. A. D. McNair, Dr. E. F. Jacob, and Mr. C. K. Allen, who all devoted much time and care to reading the work and formulating very helpful criticisms of different portions of it; I am also deeply indebted to the Master of Balliol for his valuable help and keen interest. Finally, I desire to record my gratitude to the University of South Africa, without whose practical aid the research for and composition of this work would have been impossible.

Of the work itself, it is only necessary to say that its approach to its subject is that of the jurist rather than the lawyer, and it confines itself to the juristic aspect of the problem, leaving to a later and more extensive work the study of its historical and practical aspects.

F. H.

TEMPLE,
LONDON.
30 *May*, 1930.

CONTENTS

PREFACE . . . . . *page* vii

INTRODUCTION . . . . . *page* xiii

PART I

I. THE FICTION THEORY: F. C. VON SAVIGNY AND A. V. DICEY . . . . . *page* 3

Controversy as to Roman theory of associations — Savigny and the Roman law — his individualism — his account of the fictitious character of corporate persons — its practical consequences: in private law, in public law — its effect on the distinction between public and private law — Concession Theory — Savigny's theory of the state — distinction between political and legal issues — Dicey's rationalism — his theory of legal sovereignty — his distinction between political fact and legal fact — Austinian sovereignty criticized — merit of Austinian jurisprudence — conception of sovereignty — imperative character of law — Duguit on sovereignty — sovereignty an essential aspect of juridical organization — summary.

II. NEO-KANTIAN JURISPRUDENCE: RUDOLF STAMMLER *page* 29

Rationalistic theories — rationalism — critical method of Kant — neo-Kantian jurisprudence — Stammler and Kelsen — Stammler's theory of law — his view of jurisprudence — his theory of the state — his account of the content of law — his theory of associations — his view of relation between law and state — his theory of sovereignty — Stammler's method — similarity between theories of Stammler and Austin — Stammler's formalism — he cannot avoid Concession Theory — inconsistency in his definition of the state — Stammler's debt to Kant — he accepts Kant's view of freedom — objection to Kantian moral theory — same objection lies against Kantian jurisprudence — Kantian demand for finality in jurisprudence — Kantian dualism of the form and matter of law — abstractness of Stammler's thought — consequent error of his theory of associations — criticism of Stammler's method — logic, law, and society — Stammler's inconsistency — Kelsen's criticism.

III. NEO-KANTIAN JURISPRUDENCE (*continued*): KELSEN. HEGELIAN JURISPRUDENCE: BERNARD BOSANQUET . *page* 49

Importance of method — *Naturrechtstheorie* — Kelsen's criticism of it — his aim — his 'purely normative' jurisprudence — his theory of the state — his use of metaphors — his inconsistency in using them — reason for his use of them — analytical character of his jurisprudence — his account of corporate bodies as 'parts of the entire legal organization' — his recognition of their social foundations — implies refutation of Kantian dualism of form and content, norm and fact — criticism of Kelsen's juristic principles — criticism of his method — results of discussion of Kantian jurisprudence — the Philosophical Theory of the State — reason for discussion of it in connexion with rationalistic theories — Bosanquet — difficulties arising from his use of terms — his aim — the means

by which he proposes to realize it — his distinction between actual will and real will — identification of real will with ideal will — Bosanquet's account of the state — its aim — it differs from that of Kelsen — its similarity to Austinian Theory — Hegelian identification of reality and value — individual freedom and the Philosophical Theory — *petitio principii* in Philosophical Theory — Hegelian idealism and pragmatism — dangers of Philosophical Theory — same implications as Concession Theory and Fiction Theory — cannot explain international law — grounds for its rejection, two: destroys distinction between actual and ideal, and confuses juristic with metaphysical issues — jurisprudence and psychology — logical error or rationalism — contribution of rationalistic jurisprudence.

PART II

I. PRAGMATIC JURISPRUDENCE: LÉON DUGUIT . *page* 75

Sociological jurisprudence — Duguit's realistic method — Gény's criticism — Duguit and Comte — Duguit and Bergson — pragmatism — Duguit's criticism of conception of subjective right — his hypothesis of social interdependence — his theory of *droit objectif* — his theory of social reaction — criticisms — Duguit's reply — criticism of his theory of *droit objectif* — conflicting tendencies in Duguit's thought — his criticism of conception of corporate personality — his theory of associations — his inconsistency as a realist — his rationalism — introduces conception of natural law — his substitution of co-ordination for subordination — difficulties which Duguit's theory of associations cannot meet — his conception of law abstract — conflict between his realism and his rationalism — his neglect of 'will' as element in juridical situation — his failure to connect actual and ideal aspects of law — normative character of social facts — Duguit's syndicalism — criticism — Duguit's materialism — Hobbes — Duguit's neglect of individual initiative — value of conception of subjective right — and of corporate personality — Duguit's treatment of associations inadequate — his dogmatic empiricism — his theories of function and of organ — summary.

II. MODERN SOCIOLOGY AND THE STUDY OF GROUP-LIFE . . . . . *page* 106

Jurisprudence and sociology — sociology and the special, social sciences — nature of science of sociology — Comtian sociology — Durkheim — recognizes specificity of social fact — his positivism — his theory of the collective consciousness — error of positivism — sociology, a teleological science — psychological theories: Tarde, Le Bon, Freud, McDougall — Giddings' 'consciousness of kind' — dualistic hypothesis of sociological research — limitations of sociological theory — antinomy of society and the individual — their synthesis — data of sociology — psychological theory of 'selves' — qualitative differences of groups — psychological basis of these differences — source of social solidarity, the individual — summary — sociological and juristic theory — importance of this chapter for later discussions.

PART III

I. THE THEORY OF THE REALITY OF CORPORATE PERSONS: OTTO VON GIERKE . . . . . *page* 137

Fiction Theory rejected — results of previous discussions — the 'fictionists' and the 'realists' — Otto von Gierke — his attack on Roman jurisprudence — *Prin-*

zip zur gesammte Hand — the *Genossenschaftstheorie* — *Sozialrecht* — Gierke's theory of the state — its organic character — his theory of the reality of corporate persons — difference in legal treatment of individual and corporate persons — state sovereignty — state and the objective law — social sanctions of law — jurisdiction of state over corporate bodies — summary of Gierke's jurisprudence — its character — its relation to Roman jurisprudence — its great service — its aim — its confusion of social and legal issues — Gierke an adherent of the *Willenstheorie* — results when he comes to deal with the relation of the state to corporate bodies — Gierke's theory of the state and the Hegelian theory — Gierke's psychological realism later displaced by an abstract rationalism — results of the change — reasons for it — Gierke's failure to carry out the directions of the *Prinzip zur gesammte Hand* — his confusion of *de jure* and *de facto* personality — error in his logic — law and society.

II. THE THEORY OF SUBJECTIVE RIGHTS AS LEGALLY PROTECTED INTERESTS: RUDOLF VON IHERING AND N. M. KORKUNOV . . . . . *page* 166

Organic conception of society — *Willenstheorie* — individualism — Ihering — his sociological point of view — his criticism of the *Willenstheorie* — his theory of subjective rights — its place in his entire jurisprudence — his theory of corporate personality — his failure to appreciate the real meaning in ascription of personality to corporate bodies at law — generality of law — evolutionary character of law — Ihering's theory of subjective rights cannot lead to their understanding as dynamic and evolutionary — Ihering's theory of the state — his theory of law as *Politik der Gewalt* — his theory of auto-limitation of state — need of a natural law with a variable content — Ihering's error in excluding element of will from the definition of rights — its consequences — corporate personality real *as a legal phenomenon* — Korkunov — his definition of the function of the state as the delimitation of interests — his advance on Ihering — his rationalism — his error same as Ihering's — teleological and mechanical aspects of social phenomena — both essential to understanding of law.

III. THE STATE AS PRESUPPOSITION OF THE LAW: GEORG JELLINEK. THE LAW AS PRESUPPOSITION OF THE STATE: H. KRABBE . . . . . *page* 189

Theories of subjective right — Georg Jellinek — his aim — his opposition to the *Willenstheorie* and to Ihering's theory — *System der subjektiven öffentlichen Rechte* — Jellinek's theory of corporate personality — his criticism of the Fiction Theory — his theory of the state as a juristic person — his view of sovereignty — his theory of auto-limitation — priority of state over law in Jellinek's system — failure of Jellinek's theory of the state due to his not following out faithfully the precepts of his own theory of subjective rights — his rationalism due to overemphasizing distinction between social and juristic theory — Krabbe — his theory of the sovereignty of law — his antithesis of personal and impersonal — his agreement with Ihering — his objection to juristic personality of the state — his criticism of Jellinek's theory of subjective rights — law as 'the precipitate from an evaluation of competing interests' — Krabbe's democratic law — priority of law over state in Krabbe's theory — appreciation of Krabbe's work — objections to which it is open — Krabbe's false view of psychology — his confusion of juristic with political issue — his rationalism — his theory of the state involves Concession Theory — reason for Krabbe's errors: incomplete appreciation of social fact which forms the content of law — the struggle for right — competing interests and clashing wills — law as a compromise — summary.

IV. THE DOCTRINE OF CORPORATE PERSONALITY . *page* 217

Hauriou — his sociology — his jurisprudence — his *vitalisme social* — his Theory of the Institution and of the Foundation — its attempt to synthesize subjectivist and objectivist systems — its emphasis on importance of corporate institution as law-creating power — Hauriou's definition of the institution — his theory of corporate personality — his notion of *communion en l'idée* displaces Durkheim's *conscience collective* — Hauriou's reply to criticisms — his opposition to the *Willenstheorie* — his opposition to Ihering's theory of subjective right — his own theory an attempt at their synthesis — importance of Hauriou's work — its defects — its confusion of sociological and juristic issues — his theory of the institution a satisfactory *analysis* of the corporate body into its social elements — but not a satisfactory account of the juristic phenomenon of personification in which those elements are synthesized — value of Hauriou's Theory of the Institution — its influence on Michoud and Saleilles — their sociological jurisprudence — neither confuses sociological and juristic issues — their definitions of subjective right — reasons for preferring Saleilles's definition — Saleilles's theory of personality — appreciation of Saleilles's work.

CONCLUSION . . . . . *page* 239

BIBLIOGRAPHY . . . . . *page* 247

INDEX . . . . . *page* 251

INTRODUCTION

I

The modern attack on the state — the decentralization of authority — law and politics — Austinian jurisprudence — English and Continental jurisprudence — Maitland — the conception of corporate personality — the history of the word 'person' — its meaning — the philosophical account of personality — The social aspect of personality — its individual aspect — a concrete theory of personality — the struggle between the individual and society — individual personality something ultimate — the legal account of personality — false theories of the nature of juristic concepts — the real nature of the juristic concept as a species of the scientific concept — the nature of law — the relation of the legal to the philosophical concept of personality.

THE most striking feature of contemporary political thought is its attack on the state. Many political thinkers of the last century believed that the way of ensuring the liberty of the individual was to increase the powers of the state. The socialism of their day defined itself as state-socialism, and supported a powerful state as against the powerful individual. Since then, however, facts have outrun such theory. In between the state and the individual have appeared a great variety of corporations, some of which rival the state in the influence they exert on society and in the perfection of their organization. Trade-unions, professional associations, and great trading corporations have assumed responsibilities which advanced political opinion in the nineteenth century would have relegated to the state. Thus the old clear-cut distinction between state-ownership and private property has become antiquated, for though hostility to unfettered private property may be even stronger to-day, there is an equally strong and widespread hostility to placing property and its attendant powers in the hands of the state. The cry of the oppressed is directed as much against an alleged tyranny of the state as against the tyranny of individual caprice. The truth must be faced that many new loyalties have cut across the relation of the individual to the state, and have produced a demand for a new type of limitation of the state's authority over the interests of society. The idea of grandmotherly government has suffered severe reverses, and the state has in many respects become a discredited institution.

The extent to which this is true may be judged from the remarkable progress of syndicalism. On the continent of Europe

parliamentary government is falling into cynical disfavour. Russia, Italy, and Spain, countries whose domestic problems are far from similar, have definitely abandoned it in favour of government by means of public services controlled by professional and trade guilds or corporations. In England the same process may be observed though it has not defined itself so openly. The decentralization of authority is no longer a mere cry; it is a fact which daily grows stronger. It is at any rate sufficiently patent to enable us to understand the claim of political thinkers that our old theories of state-sovereignty are out of date and useless. The powers which these theories attribute to the state, it is claimed, are not in fact enjoyed by it, and if the state tried to exercise them the entire fabric of our political organization would probably fall to the ground. Politically speaking, therefore, it is sheer travesty of patent fact to hold that the state enjoys the unlimited power which orthodox theories of state-sovereignty attribute to it.

But the modern attack on the state is not merely the result of observing its actual limitations in the field of political activity. It is an attack prompted also by profound ethical considerations. Just as some have maintained that the state should be the reservoir of all political power, on the ground that the moral life of its members will then be best provided for, so it is generally felt to-day that the moral life of the individual is seriously menaced by a too-powerful state. Individual life will not flow freely through the channels of state-authority. They are too far removed from the sources of that life. They cramp its initiative, lack that intimate contact with its problems, and do not spring from those forces in it which alone call forth the love and loyalty of the individual man. Accordingly, against the principle of state-sovereignty is levelled the criticism that it is bad ethics as well as false politics.

Now it is inevitable that political ideas should influence law. Both are concerned with social problems; both derive their contents from the same world of social fact. It is therefore to be expected that where the development of new facts has prompted new political ideas, legal thought should also find itself in need of new constructions. But clear as this may seem, it is not always admitted by jurists. In England jurisprudence has for the most part entrenched itself in Austinian doctrine, where it claims to remain unaffected by changes in political thought. The Austinian jurist of to-day relies on his distinction between legal fact and

political or social fact to preserve his theory of sovereignty from the onslaught of those who emphasize its disharmony with actual fact. But even in England the pressure of new social forces has quickened the critical sense of some leading jurists to admit that the entire question of the relation of law and state requires reconsideration. The problem which, more than any other, has prompted this dissatisfaction with the long-accepted dogmas of Austinian jurisprudence is that of the legal personality of associations, for it is in this matter that orthodox legal theory presents the most striking disharmony with facts. Many of our modern associations, especially trade-unions and professional associations, claim to have spheres of influence over which the state has no right of control and which they do not hold of the state. Far from admitting that their powers are conceded by and derived from the state, they maintain that these inhere in them as living social organizations. They claim that they have at law a personality which is not, as the traditional Fiction Theory asserts, fictitious and created by the state, but one which the state merely recognizes as incidental to their corporate life, because this life is a fact which no legal construction can obscure and no state dare deny. Accordingly, the challenge which the so-called syndicalist forces of trade-unions and other associations have issued to the power of the state has led some leading English jurists to doubt whether the orthodox legal theory of state-sovereignty is sound, and at least two of them have recognized that the state is in urgent need of repair, not only in respect of its administrative machinery but also in respect of its juristic structure.

On the continent jurists have been far less wary in their attack on the absolutist theory of the state and the Fiction Theory about the legal personality of associations, which is its logical corollary. One reason is probably that continental states have not hesitated to assume in practice the powers which abstract legal theory might attribute to them, whereas in England that 'supralegal, suprajural plenitude of power concentrated in a single point at Westminster' has found its home in the lawyer's mind rather than in the political forum. Another probable reason is that continental lawyers are in the habit of taking juristic theories more seriously and literally than are English lawyers. The Law of Germany and the Law of France are codified, and accordingly abstract theory plays a more important role in their operation than it does in our Common Law,

where theory is largely based on and changes with a moving process of particular decisions. And it may be that temperamental differences have also played an important part in making continental jurisprudence bolder and more progressive than our own. At any rate it is a fact that in his doubts concerning the truth of his orthodox theories about the state, the nature of law and the nature of corporate personality, the English jurist has found himself on the fringe of problems which continental jurists have long debated in the most critical fashion. His obvious course is therefore to examine their works, to overcome the traditional insularity of his outlook, and to regard the foreign jurist as a fellow-scientist inquiring into the same problems. This is what Maitland wished to do. But to pass from English to continental jurisprudence is no easy matter. The apologetic manner in which Maitland sought to acquaint the English lawyer with a German theory of corporate personality, especially when trying to lighten the burden of following Gierke in his more philosophical excursions, shows how keenly he felt the difference between the general outlook of the English and that of the German legal mind.

The English jurist approaches his problems in a very different way from that of the German or French jurist. It is easy to pass from the works of Gierke or Jellinek to those of Michoud or Duguit in spite of the profound differences in their theories. French and German jurists have always kept in close touch with each other's writings, and this has been possible and fruitful because their problems have been essentially the same. It is, however, an embarrassing task to bring any of these writers into the province of English juristic literature. The English jurist does not recognize certain problems which they regard as fundamental for juristic science. To put the matter somewhat bluntly, he does not see that the jurist has to face certain philosophical difficulties and requires philosophy for their solution. Jurisprudence is for him a well-marked-out science. It is exclusive, has its own problems and its own dialectical machinery for solving them. For the French or German jurist, however, jurisprudence has no such well-defined and easily recognizable boundaries. At every turn in his treatment of juristic problems he meets with difficulties, to solve which he does not hesitate to call in the aid of the philosopher and the sociologist. Consequently his writings frequently contain philosophical discussions which usually prompt the sarcasm of

English lawyers, and deal with the works of philosophers and sociologists whose very names are unknown to English juristic literature. These are, of course, generalizations, and exceptions to them can be found; but they are surprisingly few. Only two names, those of Maitland and Geldart, stand out in connexion with the problem of corporate personality. And they went no further than to state the problem in a fuller light, the one from an historical, the other from a practical point of view. They issued an invitation to the philosopher and the sociologist—they did not themselves attempt—to study the nature of group-life, with a view to supplying the jurist with that knowledge of social formations necessary for a thorough understanding of the associations to which he ascribes personality. As Maitland said, there is a genus of which state and corporation are species, and this genus will reveal itself only to sociological inquiry which goes beyond the consideration of legal technicalities to the contemplation of social facts. Or, as Geldart warned the lawyer, the personality of groups is not a matter in which he alone is interested. It is also the concern of the philosopher, the sociologist, the psychologist, and indeed of any one who studies social phenomena. Whatever they may have to say about it has a meaning for the jurist and he must pay respectful attention to their views. Thus we have at least the support of a great English legal historian and a distinguished Vinerian Professor if we carry the discussion of the juristic problem of corporate personality, with its concomitant problems, into the wider fields of philosophy and sociology, where the orthodox English jurist would fain not follow us.

In order to explain why our inquiries must lead us into the discussion of certain essentially philosophical questions, we cannot do more for the present than state a thesis which only the whole body of this work can substantiate. The juristic conception of corporate personality is not simply a technical device of the lawyer by means of which he satisfies a purely formal requirement of legal construction. Nor is it, as some think, a natural conception which is to be used and not analysed. It is one of those conceptions which constitute the very context of juristic thought, and without which the jurist lacks an essential part of his conceptual equipment. Like those other essential concepts of juristic thought, the concepts of law and state, it cannot be studied except in relation to the facts which it is meant to construe legally. It thus raises a fundamental

logical problem, the nature of the juristic concept as a species of scientific concept, its relation to and distinction from the world of facts on which it puts juristic form. Only by dealing thoroughly with this problem can we hope to devise juristic theories which are not dogmatic and which avoid equally an abstract rationalism and an uncritical empiricism. Accordingly, the general theme of this treatise will necessarily be the nature of juristic concepts or, looked at from a different angle, the methodology of juristic thought. But we would avoid as much as possible abstract logical disquisitions, which always involve the danger of a formal rationalism. We shall, therefore, undertake the discussion of juristic concepts under the pressure and guidance of those problems for whose solution they are used. The word 'method' is usually somewhat distasteful to minds in constant touch with living realities. Do what we will, we emphasize methodological considerations at the risk of seeming if not of becoming pedants. And this is due to more than a peculiarity of temperament. Inherent in all our efforts to think is the danger that our intellectual constructions may take the place of the life they construe, and we unwittingly depart from the real world to a region of pure thought in which life is not explained but dismissed as unreal. Against such a fate our only safeguard is to watch our thought. It is, however, not in any abstruse discussion without reference to the world of contingent experience that we should scrutinize our method of studying it, but in the course of dealing with its complex problems. We shall therefore discuss the method of juristic thought, which raises the problem of the nature of juristic concepts, side by side with those problems which are the special concern of this work.

As we have said, it is generally on unfamiliar ground that the English jurist finds himself when asked to enter into the discussion of philosophical and sociological questions. The latter he will usually regard as interesting but irrelevant to his real purpose. The former, he will probably confess quite frankly, bore him. Now, these are facts which must be taken into account if we wish to enlist his support for a 'philosophical and sociological jurisprudence'. Accordingly, in order that the shock of meeting philosophical difficulties in the realm of juristic construction may not prove too severe for the jurist—or, we may add, the application of philosophic notions in the work of juristic science too revolutionary for some philosophers—we propose by way of introduction

to examine the problem of personality as it appears to the philosopher on the one hand and to the lawyer on the other. In neither case will any final solution be sought or attempted. It is only in order to observe the different ways in which they deal with the problem and so to supply the necessary background for later discussions concerning the nature of certain juristic concepts that we shall here state the relation and difference between the philosophical and the legal conceptions of personality.

The very history of the word 'person' shows that it has not the same meaning for the lawyer as for the philosopher. But the same history shows that its legal meaning and its philosophical meaning are closely related not merely by reason of historical accident but by virtue of a deeper logic. Into this we shall inquire presently. To those who treat a philosophical account of personality as quite irrelevant to the lawyer's interest in it the simple reply can be made that they are ignoring the history of the conception through which it has acquired the meanings which it now has.

The Latin *persona* from which our 'person' is derived meant originally an actor's mask. The Roman lawyer thus found it a suitable word to denote the subject of civil rights and duties. The latter was one who could be a party in a legal dispute, one who could, so to speak, act in a legal drama, and accordingly it was by no great stretch of the imagination that he could be termed a *persona*. This was all that the word meant in classical Latin, and it would very likely have retained this restricted meaning had it not been for the Latin theologian who wanted a Latin word to translate the Greek ὑπόστασις. The great debate about the Christian Trinity was finally settled by holding that its οὐσία was one, its ὑποστάσις three, and the theologian of the Western Church was faced by the problem of finding Latin equivalents for these two terms. οὐσία, which under the influence of Aristotle's philosophy had come to mean real being considered in respect of its intelligible character, was translated by the Latin *substantia*. But for ὑπόστασις there was no obvious Latin equivalent. Literally it meant 'a standing under or below'; and in classical Greek it meant only the dregs at the bottom of a fluid, the sediment, or one who lies in ambush. But the Stoics gave it an abstract meaning. They made it denote real concrete existence as contrasted with mere appearance which has no solid foundation. Later, in post-Aristotelian philosophy, it came to be used instead of the Aristotelian

ὑποκείμενον,[1] which meant a subject or substratum, but it did not have the association which ὑποκείμενον had with the idea of indeterminate matter (ὕλη). ὑπόστασις thus came to mean the real determinate individual being which οὐσία denoted, only whereas οὐσία emphasized its rationality, ὑπόστασις emphasized its concrete independence. Now it was this word ὑπόστασις which the Latin theologian translated by the word *persona*. Accordingly, *persona* acquired the meaning of concrete individuality, a meaning which it did not have for the lawyer of Rome. But its original meaning continued to assert itself, and it emphasized something which ὑπόστασις did not. It expressed the rational nature of a *persona*, for only a rational *persona* could be an actor in a play or a party in a legal dispute. Thus the two distinct meanings of the word *persona*, its meaning for the Roman lawyer and its meaning for the Latin theologian, were combined in the classical definition of its philosophical meaning which Boëthius gave in the sixth century. *Persona est naturae rationabilis individua substantia*—a person is the individual subsistence of a rational nature. And as Professor Webb says, 'within the lines suggested by Boëthius' definition there has been a continual oscillation according as the thought emphasized by the Greek word ὑπόστασις, of independent and fundamentally unchangeable individuality, or the thought of social relationship and voluntary activity suggested by the word *persona* has been uppermost'.[2]

For us the natural sense of the word contains both these meanings. When we refer to a man as a person, and still more when we speak of his personality, we mean that he has a concrete individuality which is unique and independent, and that he is a moral agent, in which capacity he has an ideal end to pursue in a society of persons. Ordinarily we find no difficulty in using the term. We use it to express either the individual or the social aspect of human life. But philosophy cannot oscillate between these aspects, as we can and do in the practical conduct of life. It cannot stop at any fragmentary or one-sided account of personality. Its interest lies in nothing short of the concrete fact of personality as a whole in all its aspects. Why then should philosophies in the past have oscillated between its two aspects of individuality and sociality?

[1] For this account of the history of ὑπόστασις, I am indebted to Professor Clement C. J. Webb, *God and Personality*, Gifford Lectures (1918), p. 41.

[2] *Ibid.*, p. 54.

The reason lies in a logical difficulty which these philosophies have been unable to overcome. This is the old difficulty of the one and the many, of unity and plurality, of identity and difference. If personality is something ultimate, incommunicable and independent, how can it be a part within a larger whole, society? Or, to reverse the problem, if personality requires for its development a society which includes other personalities, how can it be something ultimate and independent? This antithesis, which we have expressed in abstract terms, is no mere invention of the intellect. It is the logical expression of that struggle between the individual and society which is present throughout the life of personality. It is just because personal life presents this antithesis as a fact that the philosopher is prompted to inquire into the nature of personality and to attempt some ideal construction of the facts which it presents, so as to gain the peace of understanding in place of the agony which results from a meaningless conflict. But philosophers have often lost themselves in a maze of their own abstractions, and losing sight of the real problem as presented by the facts, they have constructed a one-sided metaphysic which simply puts aside the logical difficulty. Some have attempted to overcome the antithesis of the individual and the social aspects of personality by supporting an extreme individualism, which preserves the unique reality of the individual human being and denies the reality and importance of society. Others have maintained an extreme collectivism which denies the concrete independence of the individual life and affirms the sole reality of society as a unitary organism. Both have avoided the real problem, which is to explain individuality and sociality as aspects of a single reality, the complete life of personality.

The criticism which applies equally to both of these types of philosophy is that they do not face the facts on which it is their business to reflect. Philosophy is not interested directly in this or that particular fact in human experience. These facts are of interest to the various sciences and, of course, to the individual in whose act of experience they are presented. What the philosopher is concerned with are the judgements which the sciences and acting human beings make about the facts with which they meet. The lawyer has a certain judgement to make about the nature of human life, the sociologist another, the psychologist another, and so on. These judgements bring to light what are to the philosopher different *aspects* of the concrete fact of personality, and his aim is

to understand them as such. They are facts which he must explain, not deny. What the extreme individualist and the extreme collectivist do is to deny one half of the facts in order to retain without logical contradiction the other half. They sacrifice the facts in the interest of a formal logical consistency. As we shall see, the reason for this is that they mistake for the methodology of philosophical thought the operation of an abstract and formal logical dialectic. Accordingly, as soon as we bring their theories in contact with the facts which they are intended to explain, they fall to the ground.

The conception of personality is the meeting-point of thought and reality, of philosophy and life, for it is a concept which embraces the entire fact of human life in all its aspects. We can entertain such a concept only because, if our experience brings to light distinct aspects in human life, yet these aspects, though distinct, imply each other as soon as we attempt to explain any one of them. We assert that personality is something ultimate, its life essentially incommunicable and private. At the same time we find that it is a self-conscious unity which can know itself as such only by contrasting itself with a world which is not itself. Its very selfhood demands its relation to other selves. Furthermore, we affirm that it possesses an independent will, and is as such the author of its own acts, only to find that its practical activities necessarily bring it into contact with a world on which it tries to make its impress and which reacts on it. In short, the individual and the social aspects of personality reciprocally imply one another while being antithetic to each other. Whatever we may do, therefore, we cannot deny either their distinctness or their essential relation.

By pursuing the line of thought suggested by the social character of personality, however, some philosophers have been led to the view that the supposed concrete independence of individual persons is an illusion which disappears when we inquire seriously into the real nature of personality. If, it is agreed, we recognize the full implication of the fact that personality requires a social context for its expression, than we must admit that its life is essentially a nisus towards a larger whole, and that this whole, which includes other personalities and cannot be constituted by any one individual personality, is the only true concrete individuality. From this it is concluded that society has a personality in which the contradictions between individual persons, which arise out of their apparent ex-

clusiveness, are overcome. Now this personification of society rests upon a *μετάβασις εἰς ἄλλο γένος*, a transition from the world of living fact to the world of intellectual concept, in which no account is taken of the abstraction involved in the process by which thought obtains the concept of social unity. The organic unity of society, to which personality is attributed, is an ideal synthesis of the contents of human experience. These contents have been abstracted from the particular acts of experience in which they are presented, and therefore, whatever unity of their differences may be constructed by the use of concepts cannot be identified with the unity of society as a group of living persons. The essence of the matter is this. However identical may be the contents of my act of experience with the contents of your act of experience, the fact remains that our acts are not one but two. To infer from an identity of the contents of different acts of experience the identity of the acts themselves is to overlook the fact that we have abstracted the contents from the acts in which they are presented. The theory which we are criticizing errs in neglecting this fact and regarding the contents of different acts of experience as existing in and for themselves. On that reasoning it hypostasizes the organic unity of these contents and concludes that this hypostasized unity is, to use Boëthius' words, *naturae rationabilis individua substantia*. Whether we regard this unity as an ideal to be realized or as an existent reality we err for the same reason that it is a construction which thought has achieved by abstracting from the concrete fact of personal life. To hypostasize it is to alter the essential meaning of the term personality as it applies to the individual human being, and this itself means that we have lost touch with the problem of human personality, which is the first and last concern of philosophy.

In opposition to the one-sided account of personality which the organic theory of society offers, we must emphasize its aspect of individuality. The essential attributes of personality, self-consciousness, and will, exist only in human beings. Whereas society is characterized by a plurality of centres of volition and cognition, the individual human being is characterized by the possession of a single centre of volition and cognition. It is only in and through him that those relations which make up the context of society exist. Through his individual experience alone are presented those contents which the organic theory would hypostasize. In short,

human personality is something ultimate. No philosophic systematization of the contents of human experience can abolish the unique individuality of each self-conscious, willing human being who has that experience. Accordingly, whatever end philosophy may ascribe to the social life of the individual person, it must define that end in terms of his self-realization. The social nature of personality must be studied as the nature of personality which is at the same time individually unique. Philosophy is born of experience, and the only experience which we know of is the experience which we have as individuals. It is either my experience or your experience or that of some other individual. The facts with which the philosopher is concerned, out of which his problems arise, and to explain which he produces concepts, are ultimately the facts of such individual experience, and unless his theories explain these facts as incidents in the life of the individual human being, he does not solve the complete problem of human philosophy. Accordingly, in dealing with the problem of personality, no theory has any philosophical value which does not recognize the full import of its individual as well as of its social aspect.

This view leads to conclusions very different from those supported by the organic theory of society. In the first place, it follows that the ultimate unit of value to which alone attaches the character of goodness is the individual human being, for there is no goodness other than personal goodness, and only in the individual human being are found the essential attributes of personality, incommunicable privacy, self-consciousness, and will. True, wherever individual personality functions it affirms a nisus towards a larger whole, but this whole exists only in and through the states of consciousness of the individual person. Society is a network of relations between persons which has no existence apart from those persons, and however perfectly organized and highly developed these relations may be they can never absorb the unique individualities between whom they persist. Accordingly, the life of society, by which we mean the several interacting lives of a number of persons socially related, always presents a struggle between the individual person and the collectivity. This struggle is inherent in the very life of personality. For it is not a struggle between human individuality and a force entirely alien to it. It is a struggle in which the two contesting forces are elements of a single reality, human personality. The one is the force of individuality, which

claims freedom for the individual and opposes the interference of social forces with his free self-expression; the other is the force of sociality, which likewise has its foundation not outside of, but in human personality, because it strives for a union with other personalities which the very nature of personality demands.

Contrary to theories which treat this conflict as an illusion which disappears once our thought goes deeper than the phenomenal aspect of things and as something evil, our own view leads us to consider it as having an essential value for human life. It is not simply the negation of that life in which personal goodness emerges; it is the real scene of that life. Where the struggle between individuality and sociality, between the individual and society, is absent, personality does not exist. Morality is not the discovery of a formula but an achievement, and it is born only of a struggle in which the two aspects of personality—individuality and sociality—have each asserted their claim to control the life of man. Considered in respect of its effect on the life of the individual person, the struggle presents a spiritual conflict within him, and the ethic which it thus suggests is that, firstly, only he can live his own life, and, secondly, his happiness is the product of an adventurous journey along a road strewn with conflicting ideas and clashing passions. Considered in respect of its effect on the life of society, the struggle appears as a conflict between distinct persons. If we speak of a conflict between society and the individual we should bear in mind that our thought is taking a short cut, for it really means that the conflict is between the individual person on the one hand and a grouping of distinct individual persons socially related, and not a supra-individual person, on the other. And let us make no mistake. This struggle is not merely one of ideas which is simply awaiting the discovery of a logical formula, when it will be resolved once and for all. It is a struggle which involves a conflict not merely of ideas but also of wills, and in this conflict the blindness of passion is at least as potent as the light of reason. The parties engaged in it are not mere thinking-machines or intellectual abstractions which can be permanently attuned to one another by means of a logical construction. They are men of flesh and blood who will at times sacrifice everything to achieve their individual aims rather than take the easier road of compromise. The last generation was wont to emphasize that at the basis of human life lies a material struggle for existence, a brutal fact which

it is the aim of civilization to abolish. Civilization, it is true, does and should alter the means of the struggle and elevate its purposes. But it does not do away with the principle of the struggle. On the contrary, it gives the struggle a profounder significance. It puts a spiritual conflict where at first there was only a conflict of surging instincts. We must realize that in principle the struggle does not cease when we pass from the plane of elemental, primordial forces in man's life to that higher plane, the scene of his moral life, which the spiritual efforts of countless generations condition. The struggle between the individual and the social elements of personality is not simply the means through which we win our existence but also that through which we gain the precious fruits of the highest moral life.

The chief implication of all this for the philosopher is that he must at all events hold on to the idea of individual personality as something ultimate. It is within the personality of the individual human being that the struggle goes on, and whatever goodness emerges from it is real only in so far as it is sustained by his self-consciousness and will. The conception of group—or corporate—personality must therefore be rejected as *philosophically* untrue. To hypostasize society is to neglect one essential aspect of personality, its individual aspect, by reason of which it can exist only in the individual human being with his single centre of self-consciousness and will. There is no higher good than the good of human personality, and only that can be called a good which can be explained in terms of the self-realization of the individual human being. The social is an aspect of the personal, and it has value only in so far as it contributes to the life of individual personality. Its real nature, therefore, cannot be understood through studying it in abstraction. It must be studied in conjunction with the individual aspect of personality. By doing so we shall not fall into the errors either of the individualist or of the collectivist. We shall hold on to the entire fact of personality both in its individual and in its social aspect; and instead of losing ourselves in the machinations of an abstract rationalism which disregards whatever spells conflict we shall look upon the struggle within the life of personality as essential to its very existence. Accordingly, our theory of right will, like our theory of morality, differ from that of the rationalist. As from the inner conflict of personality emerges Goodness, so, we shall hold, from the struggle between persons emerges Right.

Apart from spiritual conflict Goodness has no meaning; apart from the social struggle Right has no meaning. It is born only of action; it is essentially a manifestation of Spirit in its practical activity. In and through the social struggle does the human spirit embody itself in laws and institutions in which is realized the ideal of Right. Accordingly, any social philosophy which attempts to explain away the conflict between individuality and sociality in the concrete life of personality does away with the essential significance of the notion of Right. It will in any case produce a social theory which does not interpret the actual life of society, and which will therefore have disastrous consequences if applied to the practical problems of social organization.

If we have explained the double suggestion in the philosophical conception of personality, its double suggestion of *persona* and *ὑπόστασις*, of sociality and individuality, we shall have done all that we intended in this short philosophical excursus. We have of course done no more than state the problem of personality with which the philosopher is concerned. But it is sufficient for our purpose. The important point which it has brought to light is that sociality and individuality are both essential *aspects* of a single process of life, the concrete life of personality, and if we wish to understand that life we must recognize both these aspects.

As we said at the beginning of this Introduction, the English legal mind does not take so kindly to philosophy as does the French or German. It is therefore all the more necessary that this Introduction should explain why the jurist must discuss the philosophical problems which it raises. Most English jurists will say—'this may be very interesting in itself and, for all we know, good philosophy, but it does not concern us at all in so far as we are dealing with juristic problems'. In the first place we shall be told that what philosophers mean by the word 'person' is something quite distinct from what the lawyer means by it, as the history of the word itself shows. Secondly, any insistence on the importance of methodological considerations will be met by the objection that the law has its own concepts which are not open to philosophical criticism, because they do not rest on any theory of values but on the fact that Authority has decreed them to be used in juristic construction. These two contentions require our careful consideration, for with their falsity or truth stands or falls our chief contention, that the jurist has to deal with certain philosophical problems.

The statement that the 'person' of law and the 'person' of philosophy are not one and the same is plainly true. The lawyer means by a person simply a legal right- and duty-bearing unit; and that this is something different from the 'person' of philosophy is affirmed by the fact that the lawyer used the term *persona* long before it acquired its philosophical meaning in the hands of the Latin theologian. But the objection which we have noted goes further than to point out a distinction between the two meanings of the word. It goes so far as to assert that its legal meaning has no essential relation to its philosophical meaning. The legal 'person', it asserts, need cause the lawyer no difficulties. To know who is a person he need not enter into philosophical questions of individuality and value; he has merely to examine a body of positive laws which will tell him quite definitely who is and who is not a person. The legal conception of personality is not open to the critical inspection of the philosopher. So far as the law is concerned, it is a fact to be accepted, not a value to be appraised. The attempt to bring philosophic considerations into the realm of law with a view to redefining its conception of personality is therefore useless. Thus the objection that we are confusing issues by linking up the legal with the philosophical conception of personality goes hand in hand with an absolute separation of legal concepts and social facts. Law is made to depend upon the command of an authority which is unquestionable. If it is in disharmony with social fact, it is not thereby rendered illegal. It remains law, though morally and socially it may be bad law. So it is with the concepts which the lawyer uses in his legal constructions. They are valid legal concepts because they *are actually used* in legal construction. In other words, the lawyer starts off with a given equipment of concepts which it is not his business to criticize but to use and to apply to the facts of social life which the law seeks to regulate. And the important point about English legal thought is that this is not only the view of the practising lawyer, who is right in adhering to his work of merely stating the law as it stands, but often also that of the jurist, whose business is to examine the working of the law in relation to the ends which it has in view. Accordingly, it is important that any treatise on juristic problems should state clearly its view of the nature of juristic concepts and their relation to social facts. There are, broadly speaking, three possible theories.

One theory holds that juristic concepts are deducible *a priori* by

the operation of a logical dialectic. It claims for them the universality and permanence of truth, and accordingly it maintains that they give us knowledge of concrete reality. We shall have occasion later to examine the practical results of this theory. Here we need only note its philosophical error. It mistakes the aim of jurisprudence as a science. The scientist does not offer his judgements as explanations of the concrete nature of the facts with which he deals. His interest is not in those facts for their own sake but for the sake of some *practical* aim which he seeks to realize in his treatment of them. His aim is not primarily to understand them, but to do something with them. The jurist, in defining the legal character of social facts, does not pretend to offer an explanation of the nature of those facts in their concrete reality. He offers his account of them as admittedly abstract or limited. If the objection is raised that the facts are not what his concepts make them out to be, he will quite rightly answer that they were never intended to give us a true knowledge of the facts. Their value is not a theoretical one; it is essentially practical in the sense that it consists in enabling us to do something with the facts of social life. In itself, therefore, the juristic concept has no value or meaning. Its value consists in the extent to which it ministers to the practical end which the law has in view. And in so far as this end is a limited one, not co-extensive with the whole range of human activity but only with one aspect of it, the concepts which minister to its realization will not and need not be complete accounts of the real facts which they construe. Jurists who hold the theory which we are criticizing either object to using the conception of corporate personality in law on the ground that there is really no such thing as group personality, or else try to prove that corporate personality is not an abstract concept of juristic thought but a real fact. For these jurists, juristic concepts must be philosophically true accounts of social facts. But this is a preposterous demand which the lawyer will rightly ignore. For his interest in the facts is limited. His aim is not to give an account of the facts in themselves and for their own sake, but to have a working model of them by the help of which he can do something with them. For the same reason, he will also rightly object to deducing juristic concepts *a priori*.

The second theory maintains the very opposite view. Science, it claims, gives no knowledge of the real nature of things. The understanding of reality is not its aim. All that it seeks is to

construct a model of the universe, and of this model it does not demand that it shall be a true account of the real world, but only that it shall 'work'. In short, the theory asserts that the interest of the scientist is purely economic. He simplifies the complexities of nature and so makes it manageable for practical purposes. The scientific concept tells us absolutely nothing about the real nature of the facts which it construes. It is simply an economic device by which we classify facts and put a reasonable number of generalizations in place of the infinite variety of particular facts with which nature confronts us. The theory warns us against attributing to these generalizations in any degree the value of truth. They are not even rungs in the ladder by which we ascend to the kingdom of knowledge. Their value is not the value of truth but the value of a machine by means of which we can do something. From the point of view of philosophy, whose aim is knowledge, the scientific concept is therefore devoid of truth, a fiction, something which does not tell us anything about reality. In short, it is not a theory at all; it is an action. It explains nothing; it merely does something. The result of this theory is thus to draw a hard and fast line between science and knowledge, between the scientific concept and the real fact. Accordingly, the juristic concept of personality has nothing whatever in common with the philosophic concept of personality. Its validity for jurisprudence does not depend upon its being in any sense a true interpretation of real personality, but simply upon its ministering to the practical purposes of law. This is the view usually underlying the thought of those jurists who support the Fiction Theory. Their chief consideration is the practical purpose of law, to introduce order into the world of social relations. Their minds are concerned with the purely practical problem of government, and they do not care whether their concepts are utterly in disharmony with the actual facts of social life, so long as they support a legal organization in which a certain formal order is maintained. They will admit frankly that in reality associations are not created by the state, but they will refuse to consider this a sufficient objection to the legal view of them as having only a fictitious personality granted to them by the state. The legal view of facts is one thing; the real or philosophical view of them is another. The former is valid from the point of view of a scientific jurisprudence not because it is a true account of the real facts, but because it does to the facts something

which the law aims at doing to them. In other words, legal concepts form an exclusive system of concepts which arises from the practical consideration of introducing a certain order into social life and not from any consideration of the real, inherent nature of that life.

We shall postpone till later the objections which legal practice itself raises against this theory of legal concepts. For the present we are concerned only with the objections which the philosopher can raise against it. Its weakness from a logical point of view is not difficult to detect. Even if science produces and aims at producing no more than a 'working model' of the universe, what right have we to speak of it as a model unless it be in some sense a replica of the real original? Surely, if science gives us a working model of *the real world*, it conveys some information about the nature of that world. If it is a pure fiction, entirely devoid of truth, then by definition we are debarred from speaking of it as a model of the real universe, and we are left with a dualism of a real world which can be understood but not regulated and an unreal world which can be regulated but not understood.[1] This conclusion is indeed accepted by the supporters of the theory which we are examining. They contend that the scientific concept lacks that universality which is the hall-mark of truth. The real is the self-subsistent, and only the universal, that which is omnipresent and self-sufficient because it contains within itself the ground of its existence, is truly self-subsistent. But the scientific concept is not a universal. It is a mere generalization. It has no reality in itself. Its being is co-extensive with its use-value, and as such it does not convey any truth but is merely an economical device for marshalling facts. Now, while we must preserve the distinction between the concepts of philosophy, which are true universals, and the concepts of science, which are not true universals, yet we must deny that the concepts of science have no degree of truth, that they do not tell us anything about reality. Scientific concepts help us to grasp the facts with which we meet in the course of our perceptive experience. Without them the world of our perception would remain chaotic, unorganized, wholly beyond our grasp so far as its orderly regulation is concerned. They introduce order into the world of our practical activities, and we must therefore recognize that they play an essential role in that synthetic construction of the manifold

[1] *Vide* Prof. J. A. Smith's paper on 'The Economic Doctrine of the Concept', *Aristotelian Proceedings*, 1925, p. 122.

objects of human experience, the ultimate realization of which is the aim of philosophy and the essence of knowledge.

These criticisms suggest a theory of the scientific concept which recognizes its limited account of the real nature of fact while denying that it is therefore a mere fiction. The reason for this is its double nature. On the one hand, it is an effort at truth, for it is an attempt to synthesize the facts of contingent experience. On the other hand, it must fail to produce a concrete knowledge of reality because it cannot attain universality. It presupposes an abstraction from the concrete fact, and its function is one of generalization. Thus science cannot proceed simply by the operation of a logical dialectic. Its constructions are always subject to the *practical* end to which they minister. But this does not mean that the distinction between truth and falsity does not extend to the realm of science. The distinction continues to operate within the abstractions of each science. This means, first, that so long as the concepts of science are not made to stand for more than they are meant to be they are true within the limitation of their abstractness. They are true for the science which uses them. It is only when we treat them as concrete truths and not as abstract concepts that they deserve the name of fictions. Secondly, they are not purely pragmatic. They are not the result purely of empirical action, of facts compelling a mind that is wholly passive in its relation to them. They could never arise if the synthetic activity of mind were not brought to the organization of empirical facts. Scientific concepts, of course, vary considerably as we pass from the realm of physical to that of social science. It may be more plausible to say of certain physical concepts than of juristic concepts that they are purely descriptive, though for the reasons which we have already stated this would not be strictly true of any scientific concept. In any case, it is certainly false and misleading to speak of the juristic concept as purely descriptive. It is an instrument for regulating personal life, and as such it contains an ideal element by virtue of which it sets a norm for personal conduct. This distinguishes the juristic concept from other scientific concepts. On the one hand, the peculiar content from the study of which the juristic concept arises is the life of personal, rational beings. On the other hand, the interest of law in that life is an ideal one operating only within certain limits. In short, juristic concepts, *quâ* scientific concepts, are the result of thought trying to put a certain form upon facts

as well as facts acting upon thought. It follows that juristic science should avoid equally two false points of view. On the one hand, it should avoid the error of the rationalist who ignores the pragmatic foundation of the juristic concept, its dependence upon the practical considerations of law. On the other hand, it should avoid the error of the empiricist who neglects the logical character of juristic concepts, their synthetic function. Juristic concepts are not true universals; they are generalizations. The true universal permeates the individual. It is omnipresent in all individuals. The individual lives in and through the universal. The scientific concept, however, stands outside the individual facts from which it is a generalization. It is not omnipresent. It is achieved through abstracting certain contents of experience from the living process in which they are presented. Accordingly, it is never identical with any or all the individual facts of which it is a generalization. Juristic concepts have the same relation to the facts which they generalize as have scientific 'types' to the particular individual instances. The former are ideal constructions of the scientific mind and are never found in real existence. The latter are the real existent facts, and they are at the most approximations to the ideal scientific type. Each particular individual has its own variation from type, and no scientific generalization, nor any number of scientific generalizations, can exhaust its unique particularity. There is a residuum of specific individuality in the particular individual which is not common to all individuals, and this residuum scientific thought, in its effort to give a systematic and coherent structure to a collection of facts, deliberately neglects by abstracting from it. But if therefore juristic concepts are not true universals, they are not pure fictions which have no relation to the true account of the real facts. They are generalizations from the real facts. Their *raison d'être* is that they enable us to do something with those facts. If they are not and do not need to be true accounts of the real nature of those facts, that is because of the limited interest which the law has in them. But limited though it be, this interest consists in doing something with real facts, and it is a sufficient answer to those who say that juristic science is not concerned with the real nature of social facts, but only with what the lawyer makes of them, to point out that the law has a practical and not a utopian aim. Laws which cannot be put into practice are of no use, and if they are entirely out of harmony with the facts of

social life they cannot be put into practice. It is therefore essential that laws should be founded upon an understanding of the real nature of the facts which they regulate. Juristic science cannot hope to regulate where it does not understand. In constructing its concepts it must take account of the real nature of social facts.

We shall not say here what belongs properly to the main body of this work. But we may state at the outset that the reason why we are undertaking this critical examination of certain juristic concepts is that these concepts have failed to do what is required of them. The orthodox conceptions of law, of the state, and especially of the personality of corporations, have utterly broken down in the attempt by their means to introduce legal order into the facts of modern social life. Indeed, they have long enjoyed the respect of jurists because their defects have been hidden behind a screen which has been supplied by the separation of law and social fact. But there is a point at which this screen must collapse. Law has to provide solutions for practical problems, and when it finds its conceptions unequal to the task it cannot but admit the need of new conceptions. Legal concepts can go, and have gone, far in forcing social facts into a mould which does not fit them; but at some point in the process the facts will break through the legal form put upon them, and then it is not the facts but the concepts which must go by the board. As we shall see presently, the conception of corporate personality supplied by the orthodox Fiction Theory has broken down completely in its attempt to give legal form to the facts of corporate life, and it is the theory which must be abandoned. And with the collapse of the Fiction Theory much of the structure of orthodox jurisprudence, with which it is inseparably connected, gives way. At first the pressure of facts may appear to demand no more than a new theory of corporate personality. But no sooner do we attempt to provide such a new theory than we find ourselves faced with the problem of altering the very foundations of orthodox juristic thought. It is because our task is no less than this that we are bringing philosophical criticism to bear upon the constructions of jurisprudence.

Our position may be simply stated as follows. Law is a special construction of social fact, and is therefore not to be identified with it. On the other hand, it cannot be entirely indifferent to the inherent nature of social fact. Law is always an attempt at the solution of a social problem, and unless it takes into account

the inherent nature of the forces which give rise to that problem it cannot hope to solve it. Thus while the legal is not the same as the philosophical conception of personality, or better, while the 'person' of law is not identical with the 'person' of fact, they are essentially related. The trouble about the orthodox legal conception of personality is that it is utterly dissonant with the actual facts of living personality. Accordingly, what the jurist is called upon to do is to redefine the legal conception of personality so as to bring it into greater harmony with the facts of living personality, and since the latter is the concern of philosophy his obvious course is to bring the legal conception to the bar of philosophic criticism. Again, this does not mean that there is no distinction between the legal and the philosophical conceptions of personality. It means simply that, up to a point, what is matter of law should be matter of fact, or what is legally true should be philosophically true. The point up to which this must be the case is determined on the one hand by the fact that law regulates living realities, on the other hand by the fact that it has a limited interest in their regulation. Hence the point which we have been urging. Jurisprudence is not concerned with concepts which are true for it because they happen to be used in legal construction. Legal concepts are just what it is concerned to discover, for it presupposes the distinction between concepts which do, and concepts which do not, give a true legal structure to social facts. In other words, legal concepts are not arbitrary inventions of an authority above and outside law itself, but have their being only in an inherently juristic context, and this context is sustained by a complex interaction of the facts of social life and thought operating with a view to giving that life a certain structure.

The common denominator of the legal and the philosophical conceptions of personality is that they both signify a life governed by principle. In such a life the philosopher finds his basis for ethics and the jurist his basis for law. The unity of character which a life governed by principle presents is the significant feature of personality for both the philosopher and the jurist. But whereas the philosopher has an interest in that character as wide as human experience itself, the jurist is concerned with it only in respect of its place in a legally ordered society. Law considers in the last resort only the external relations of human beings. The rights and duties which it affirms touch only their actions, not their motives.

Though it must of course affect their spiritual life, in so far as that life seeks to express itself in external action, it is not their spiritual life for which it seeks to provide. As it is commonly put, law provides only certain conditions under which that life can be led. In short, law presents an abstract, that is to say, a limited view of human life. But the jurist must nevertheless face the same logical problem which arises for the philosopher. Though the juristic view of society is abstract, this does not mean that it gives us an exclusive self-contained world of concepts. True, these concepts are obtained only by abstracting from the concrete social facts; but this does not mean that they are entirely independent of them. The rationalist who holds that they are, that juristic principles are to be obtained through the operation of a logical dialectic *in abstracto*, presumes a dualism of the form and the content of experience, of concept and fact, which is philosophically untenable, and in its practical consequences fraught with the gravest dangers. The purpose of juristic concepts is to organize a world of living social facts. If they are fashioned without reference to the inherent nature of the latter, then they cannot be expected to solve the social problem of law. Juristic concepts are therefore to be formed, not *in et per se* without reference to the facts which they are intended to construe, but under the guidance of a knowledge of the inherent nature of those facts. Although juristic concepts are to be distinguished from the facts which they construe, there is also a relation between them of which it is equally important not to lose sight. Accordingly, though the legal concept of personality is an abstract conception, its true significance as a juristic concept cannot be determined without reference to that personality which is not merely matter of law but matter of fact.

This explains why the philosophical account of personality concerns the jurist. He too must face the problem which arises from the antithesis of the individual and the social aspects of personal life. To the philosopher this antithesis appears as between the individual person and society; to the jurist it appears as between the state and the individual subject of rights and duties. The struggle between the individual and society lives on in the concepts of juristic thought because these concepts are interpretations of the living world of that struggle. Furthermore—and this is a point which cannot be too strongly emphasized—though the legal person and the state are abstract accounts of the real individual person

and society, they do not thereby make it any easier to reconcile the antithetic claims of the two aspects of personal life which they respectively express in juristic terms. The fact that in juristic thought we abstract from the concrete life of society frequently leads jurists to believe that the problems of social philosophy, which contemplates living facts, do not arise for jurisprudence, which considers only legal forms. It is largely in order to dismiss this dangerous fallacy, which arises from a misunderstanding of the nature of juristic concepts, that we have thought it necessary to discuss their function.

From our discussion emerge two main points which we shall merely state here, for they are matters with which we shall deal throughout this treatise. The first concerns the conception of corporate personality. Philosophy, which treats of human life from the point of view of value and completeness, cannot speak of corporate personality without qualification. In its philosophical sense personality can exist only in the individual human being with his single centre of self-consciousness and will. Law, however, which presents an admittedly abstract or limited view of human life, can speak of corporate personality without apology, because in doing so it does not and need not affirm the existence of such personality as a reality. It affirms its existence only within the province of the abstraction which juristic science makes from the world of concrete fact. But this does not mean that in using the concept of corporate personality juristic thought is in no way concerned with the real nature of the facts which, by using that concept, it organizes. Our discussion has brought to light what, it is hoped, will become progressively clearer in the course of this treatise, that the criterion of the legal personality of corporate bodies must be determined on the basis of a sound knowledge of the real nature of associative life. This leads us to the other important point raised by our discussion of the juristic concept. Juristic concepts are not to be fashioned merely through the exercise of an abstract dialectic. They are determined by the nature of the facts for whose regulation they are used, as well as by the synthetic demands of legal construction. This means what no one who appreciates the practical problems of law will deny. It means that laws are determined by pragmatic considerations as well as by formal, logical considerations. Accordingly, their nature will reveal itself only to an inquiry both into the real nature of the

facts which they seek to regulate and into the kind of treatment which they accord to those facts. This is the course which we shall adopt in examining the relation of law and state and the bearing on that relation of the juristic concept of corporate personality. In making this course clearer, it is hoped this philosophical introduction will justify itself.

And now from philosophical theory to legal practice.

II

The theory of corporate personality: its history — The Germanic theory — the Roman Fiction Theory — Gierke — Maitland — the English Theory — the implications of the Fiction Theory — *Sutton's Hospital Case* — *Salomon* v. *Salomon & Co.* — *Abrath* v. *North Eastern Railway Co.* — *Citizen's Life Assurance Co.* v. *Brown* — *Cornford* v. *Carlton Bank* — *The Continental Tyre and Rubber Co., Ltd.* v. *Daimler Co., Ltd.* — *The Representation of the People Act (No. 2), 1922* — *Quo Warranto Case* — *Rex* v. *Poplar Borough Council* — unincorporated associations or quasi-corporations — *Trades Disputes Act, 1906* — *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* — *Vacher* v. *London Society of Compositors* — the *trust* — *Free Church of Scotland* v. *Overtoun* — *Osborne* v. *Amalgamated Society of Railway Servants* — the Fiction Theory and the problem of state-liability — the Crown and the petition of right — 'The King can do no wrong' — the case of Oscar Slater — the aim of law — legal theory and practice — the problem of jurisprudence — foreword.

IF we confine ourselves to the province of legal thought we find that it is partly for historical, and partly for practical, reasons that jurists are paying increasingly greater attention to the conception of corporate personality.

Until the middle of the nineteenth century Roman law and jurisprudence had been generally received on the Continent of Europe. This was particularly the case in regard to the theory of corporations. The lawyers of Rome had invented, and the Canonists had transmitted to modern Europe, a clearly defined theory as to the legal nature of corporate bodies, which had found its way into the law and jurisprudence of all countries that traced their legal systems to the *Corpus Iuris*. But the growing nationalism which had produced national arts, national literatures, and national forms of political life was destined to produce also national theories of law. The second half of the nineteenth century was to witness a rebellion against the uncritical worship of Roman theory and the resurrection of ancient legal ideas, whose origin had no Roman flavour, and which had lain dormant under the mighty prestige of

Rome. The rebellion came in Germany, and it came with great and sudden force.

The ground had been prepared by Georg Beseler,[1] who had pointed out the sharp differences between the Roman association and the German fellowship (*Genossenschaft*). If the former had the support of learned legal tradition, the latter had the support of popular sentiment. It was an institution born and nourished on German soil; and though it had not yet found expression in polished doctrine it was dearer to the heart of Germany than any foreign theory, for it was an expression of German life. The challenge bore its fruit some thirty years later.

When it was decided that Germany should have its own Civil Code—a *Bürgerliches Gesetzbuch*—the storm which had been brewing broke out. The first Commission which had been given the task of drawing up the new Code kept to the path of orthodoxy. They ignored the claims of Germanic law and sought simply to modify the *Pandektenrecht* in accordance with modern conditions of social life. This attempt to foist a foreign law on the German people called forth the indignant protests of jurists, who, for reasons of patriotism and profound historical learning, cried out that Germany had its own time-honoured legal institutions, which should have precedence over those born on Italian soil. The leader of these 'Germanists' was Otto von Gierke, and his name is particularly important to us, for it was against the Roman, and on behalf of the Germanic, theory of corporations that he chiefly sought to influence the Commission.

Gierke pointed out that there was an irreconcilable difference between the Romanistic theory, which regarded the personality of a corporation as a *fiction*, and the theory implied in age-old Germanic practice, which regarded the personality of a corporation as a *reality*. This was no mere quarrel about the use of terms. His object was to put at the service of the German law-courts a theory which would better direct the legal treatment of corporate bodies, and he took good care to show up all the evil results for legal practice which issued from the strict application of the Fiction Theory, as that theory had lately been defined by Savigny. The effect of his work was wider than he probably expected. It influenced not only the second Commission which the protests of the 'Germanists' called into being, but also jurists of other coun-

[1] *Volksrecht und Juristenrecht* (1843), pp. 158 ff.

tries. Even in France, where the Roman tradition then had (as it still has) the halo of orthodoxy, jurists were not slow to find that what Gierke was inclined to regard as exclusively Germanic ideas were too profound to live within the limits of a national jurisprudence. They were not merely ideas on German law, but ideas which had a meaning for jurists concerned with any and every legal system. Accordingly, modern French jurisprudence manifests a large body of progressive opinion which criticizes the Fiction Theory, and, with Gierke, regards the personality of a corporation as something as real as the personality of the individual human being.

But still more striking is the fact that Gierke's work has crossed even our shores, which have been so long and so jealously guarded by the conservative forces of Austinian jurisprudence. In its theory of corporations, we have a rare instance of English law borrowing from Roman law. The ecclesiastical courts, which applied the Canon law, had made use of the Romanistic Fiction Theory in dealing with the religious corporations that came under their jurisdiction. Lawyers in the temporal courts, however, had no theory of their own, and so they were compelled to borrow from their colleagues in the Courts Christian. The result was that the Fiction Theory became the established theory of English law,[1] and, so far as juristic theory is concerned, it has neither altered in form nor lost the favour of lawyers. For English jurists have been influenced so long by the formal dogmas of Austinian jurisprudence that they have not kept pace with the French in their attack on the Fiction Theory. There is among them but one whose name stands out in this connexion. Deeply influenced by Gierke's theories, Maitland sought to bring them to the notice of English lawyers. It was a solitary position that he had to occupy in doing this pioneer work. But such was the piquant force of his criticisms that his work has gone far in disturbing the slumbrous complacency of both lawyers and jurists in England.[2] In so far then as jurisprudence has

[1] 'It slowly stole from the ecclesiastical courts, which had much to say about the affairs of religious corporations, into our temporal courts, which though they had long been dealing with English group-units had no home-made theory to oppose to the subtle and polished invader.' Maitland's Introduction to his translation of a section of Gierke's *Das deutsche Genossenschaftsrecht*, vol. iii, 'Political Theories of the Middle Age' (*Die publicistischen Lehren des Mittelalters*), p. xiv.

[2] See Maitland's Introduction to his translation of Gierke's 'Political Theories of the Middle Age', and his *Collected Papers*, vol. iii, especially the essay entitled 'Trust and Corporation'.

prompted a new interest in the conception of corporate personality the original cause lies in the work of Gierke.

But the real reason why the conception of corporate personality has come to the forefront in English juristic thought is that our courts have found the Fiction Theory inadequate for the purpose of legal practice. We are generally considered to be, and like to think of ourselves as, a nation of practical lawyers rather than of theoretical jurists. It is characteristic that we should suddenly wake up to find that we have been holding on to a theory which can no longer be applied, and indeed has been somewhat disregarded, in practice. To infer from this that English law has been produced empirically and without the aid of theory is the nonsense that comes of the false antithesis so often drawn between theory and practice. The truth is that the theory of English law has, as it happens, been developed by judges giving judicial decisions, and not, as in France and Germany, by jurists concerned with drawing up a whole legal code. The theory is there, but it requires extraction from particular judicial decisions, and that is why lawyers are sometimes apt to think that it plays a minor part in the working of the law. This also explains why we so often alter our legal practice and yet retain an old theory which is inconsistent with it. Judges prefer to give justice without altering the law, and so will frequently override an established theory, when giving judgement in a particular case, without attempting any explicit alteration of that theory.

This is what has been happening to some extent in our courts when they have had to deal with corporate bodies. The accepted theory of English law about the nature of corporate personality is undoubtedly the Fiction Theory,[1] but it cannot be said that recent judicial decisions have adhered faithfully to it. There are signs that our theory of corporations is in the melting-pot, and that our whole view of the legal character of corporate bodies will have to be thoroughly revised. It is only with the general juristic principles upon which that revision will have to proceed that we propose to deal in this work. We cannot, therefore, enter into the discussion of the many technical and practical questions which appear when we have to consider the legal nature of particular types of corporate body, churches, trade-unions, or limited companies. Such ques-

[1] See Salmond's *Jurisprudence*, pp. 339–42, and Gray's *Nature and Sources of the Law*, pp. 52–5.

tions fall outside the scope of a work concerned with problems of legal philosophy. Nor can we enter into a detailed account of the English law of corporations as it stands to-day. But the mention of certain outstanding cases will help to emphasize the vital importance of the problems raised by the juristic conception of corporate personality, and to show how even the English legal mind, in spite of its empirical genius and sanity in practical affairs, cannot dispense with a clear statement of the fundamental principles of juristic thought.

To appreciate just why the Fiction Theory has not been strictly adhered to in actual legal practice, and why it is coming more and more under the suspicion of being a false account of the legal character of corporate bodies, we must bear in mind its precise implications. According to it, the personality of a corporate body is a pure fiction, and owes its existence to a creative act of the state.[1] From this there follows the chief difficulty with which we have to contend in applying the Fiction Theory. The members of a body corporate, who are individual human beings, are real persons, but the person of the corporate body is something artificial. It is not born of, and does not live in and through, the living group of its members, but is something independent of them. It has its origin not in the active life of its members but in an act of the state. It is not a living being but a legal form put upon the corporate body by the state. In short, the chief difficulty which the Fiction Theory presents is its first and obvious implication, that the corporate person is something apart from the members of the corporate body, since it is a fiction while they are realities.

Coke made this perfectly clear in his famous judgement in *Sutton's Hospital Case*.[2] 'A corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law. . . . They (corporations) cannot commit treason nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney. A corporation aggregate of many cannot do fealty, for an invisible body can neither be in person nor swear . . . it is not subject to imbecilities, death of the natural body and divers other cases.'[3] Thus Coke gave to English law a theory of corporations in all essentials the same as the Fiction

[1] As to the implications of the Fiction Theory for constitutional or public law, *vide infra*, part i, ch. i.

[2] 10 Co. Rep. 253. [3] 10 Co. Rep. 303.

Theory. Corporations 'rest only in intendment and consideration of the law'. As legal subjects they are distinct and in kind different from the visible aggregate of their individual members. These individuals do not constitute the substance of that entity to which the law ascribes personality when it recognizes a corporation aggregate as a legal subject. Accordingly Coke held that the legal existence of a corporation aggregate did not depend upon the activities of its living members but simply and solely upon the act of the legal authority which created it.

The most striking modern case in which this view has been restated and confirmed by an English Court is that of *Salomon* v. *Salomon & Co.*[1] Mr. Salomon, who prospered as a shoemaker, converted his business into a limited liability company under the Companies Act of 1862. Salomon kept all the shares that were issued except six which were assigned to different members of his family. When the company had been formed, it issued debentures to Mr. Salomon in his private capacity as an individual. Later when the company was wound up Mr. Salomon claimed, as a debenture-holder, preference over all other creditors, and the courts had to decide whether by means of the Companies Act a man could become his own preferred creditor. The Court of Appeal decided in the negative. Lord Justice Lindley there said that if the Companies Act permitted this it would support 'a device to defraud creditors'. Lord Justice Lopes said that 'one substantial man and six mere dummies did not make a company'. In short, their Lordships refused to treat the company as an entity distinct from its members, for such a view would mean that the Companies Act paved a way for dishonesty in company finance. But the House of Lords preferred to take a more technical view of the law and reversed the decision of the Court of Appeal. Lord Halsbury said that the important question to decide was 'whether in truth that *artificial creation of the Legislature* had been validly constituted'. This had been done according to the requirements of the Companies Act, and therefore it was decided that the company of Salomon, Ltd., was a person at law distinct from its individual members, with whom it would contract in the same manner as with persons in no way connected with the company. In short, it was held that the company had an independent personality in the eyes of the law, though in point of fact it had not.

[1] (1897) A.C. 22.

Though it would appear from *Salomon* v. *Salomon & Co.* that Coke's account of corporate personality is still the established theory of English law, it is impossible to reconcile that account with other recent judgements about the capacities of corporate bodies. It would have astounded Coke if he had been told that a corporation could be malicious, or that it could have a character and a motive. It would have shocked him if he had been told that there are associations which enjoy the privileges of incorporation without the blessing of an incorporating act or charter. Yet the urgency of practical problems has driven English law from the refuge of its abstract theory into these compromises with fact.

The Fiction Theory makes it impossible to entertain the idea of a corporation being liable in tort. Accordingly, in the fifteenth century, when the Fiction Theory was logically pursued, it was accepted that a corporation was metaphysically incapable of doing wrong.[1] But in the nineteenth century it was held that trespass and trover would lie against a corporation aggregate.[2] And then, following on various enlargements of the notion, it was held that a corporation was clearly liable for any torts committed by its servants or officers acting within the scope of their employment.[3] No sooner was this view accepted and developed, however, than all criticism on the ground of inconsistency was side-tracked by the contention that it did not affect the doctrine of the Fiction Theory but was only an extension of the broader question of the liability of principals for the conduct of their agents. A corporation, it was said, could act only through its agents or servants, and in holding it liable for their torts committed within the scope of their employment we were not really introducing the metaphysical absurdity of a corporation guilty of ill-will or evil motive. This contention calls for the closest scrutiny, for at first sight it appears very plausible and has indeed commanded very learned respect.

In 1886 Lord Bramwell declared that 'a corporation is incapable of malice or of motive',[4] and accordingly no action for malicious prosecution could lie against it. As we shall see, Lord Bramwell's

[1] Y.B. 15 Edw. IV, 1, pl. 2, per Brian C.J. and the Court. Though, in still earlier times, the difficulty which seems to have been felt was one of process, namely, that the corporation was not physically amenable to *Capias* or *Exigent*. 22 Ass. 100, pl. 67.

[2] *Maund* v. *Monmouthshire Canal Co.* (1842), 4 M. & G. 452; *Yarborough* v. *Bank of England* (1812), 16 East 6.

[3] *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526.

[4] *Abrath* v. *North Eastern Railway Co.* (1886), 2 App. Cas. 247.

doctrine has been discarded. But his Lordship's reasoning in the case of *Abrath* v. *North Eastern Railway Co.* is still worthy of note and specially instructive for our purpose.

'I think the reasoning is demonstrative. To maintain an action for malicious prosecution it must be shown that there was an absence of reasonable and probable cause, and that there was malice or some indirect or illegitimate motive in the prosecutor. A corporation is incapable of malice or of motive. If the whole body of shareholders were to meet and in so many words to say, "prosecute so and so, not because we believe him guilty, but because it will be for our interest to do it", no action would lie against the corporation, though it would lie against the shareholders who had given such an unbecoming order.' [1]

Applying the same doctrine to the case of a similar order given by the directors of a company, Lord Bramwell expressed himself as follows:

'. . . the act on the part of the directors would be *ultra vires*; they would have no authority to do it. They are only the agents of the company; the company acts by them, and they have no authority to bind the company by ordering a malicious prosecution . . . and it is perfectly immaterial that some subordinate officer or individual or individuals of the company have such malice or motive.' [2]

Thus Lord Bramwell held that a corporation cannot be liable for torts in which malice or motive is a necessary ingredient. But his Lordship did not deny that a corporation could be liable for torts in which malice or motive is not an essential ingredient. On the contrary, his Lordship expressly drew a distinction between the two cases and declared that while a corporation could not be liable for malicious prosecution or for libel, it could be liable for false imprisonment or trespass. For in the latter cases 'the act of those who act for the corporation is not *ultra vires*'.[3]

This distinction is *prima facie* sufficient to call forth the challenge of any critical jurisprudence. Why should a corporation be liable for the trespass of its agent but not for the malicious act of that same agent when committed in the course of his employment? Lord Bramwell's answer was the doctrine of *ultra vires*. The corporation can do only that which is within its prescribed powers, and it cannot authorize its agents to do that which is not within the limits of those powers. It cannot authorize the performance of an

[1] *Abrath* v. *North Eastern Railway Co.*, *ibid.* at p. 251.
[2] *Abrath* v. *North Eastern Railway Co.*, *ibid.* at p. 251.
[3] *Abrath* v. *North Eastern Railway Co.*, *ibid.* at p. 253.

act which it is by its very constitution and nature incapable of performing. In other words, Lord Bramwell based his opinion on a logical implication of the Fiction Theory. But is the doctrine of *ultra vires* sound without any further qualification? Does it not result in shielding the corporation from the arm of the law where that arm should extend? In the case of trespass the members of the corporation are all jointly liable for the consequences of a joint venture. Why should not the same reasoning apply in the case of a malicious prosecution? The law of corporations aims, and should aim, at protecting society from the noxious consequences of combined action. In order to achieve that aim it must impose responsibilities coextensive with the rights which it attributes to corporate life and action. It is not a question of whether the malice or motive really had its origin and existence in the minds of each and all of the members of the corporation, but whether, since their corporate action is protected by the law, they do not each and all thereby incur the risk of a joint liability for the wrongful act of any one of them committed in the course of his conduct as an agent or servant of the corporation. If we consider the problem from this point of view, Lord Bramwell's distinction becomes artificial and unsound. The crux of the problem is not, as his Lordship thought, the difficulty of attributing a *mens rea* to an artificial entity, but the vital need of protecting society from the noxious consequences of the real activities which go on under cover of that artificial entity. Accordingly, a sound jurisprudence must revolt against any refusal to bring corporations within the entire field of the law of torts. It is worth noting that in the same case of *Abrath* v. *North Eastern Railway Co.* Lord FitzGerald, while refusing to enter into the question because he thought it did not properly arise in that action, went out of his way to say of corporations, and of trading corporations especially, 'I have often heard it observed that they certainly are very frequently without conscience, and sometimes very malicious'.[1]

Lord Bramwell's doctrine has been discarded. But the Courts have denied that the theory underlying the English law of corporations has thereby been altered. In *Citizen's Life Assurance Co.* v. *Brown*,[2] the agent of a rival company had addressed a libellous circular to persons assured in the appellant company, and the

[1] *Abrath* v. *North Eastern Railway Co.*, *ibid.* at p. 255.
[2] (1904) A.C. 426.

Court had to decide whether a limited company could be responsible for a libel published by one of its officers. It was held that the ordinary doctrines of agency and of master and servant must apply to corporations once they are to be regarded for civil purposes as persons, and that therefore the company was responsible for the libel published by one of its officers. His decision clearly renders obsolete Coke's declaration that a corporation cannot be sued in tort, and one would expect it to render obsolete also the reasons for Coke's declaration. But we are advised by Lord Lindley that his judgement does not alter the theory underlying our law of corporations, i. e. the Fiction Theory. "To talk about imputing malice to corporations appears to their Lordships to introduce metaphysical subtleties which are needless and fallacious.' [1] It was simply on 'the ordinary principles of agency' that the company was liable. His contention is, as we have said, at first sight very plausible. But, in truth, it was evading the point. The company, which was a creation of the law, was by its nature, by the very law of its existence, incapable of committing a wrong. How then could it be made liable on the principles of agency and of master and servant for the malicious act of its employee? It took a long time for the Courts to hold that an individual (who *was* capable of actual malice) could be liable for the malicious act of his agent. When, however, the Courts carried this principle over into the field of corporate activity, and held at the same time that the question of imputing malice to corporations did not arise, they were disregarding the question of substance which their technical construction involved. For, at least, it became impossible any longer to attach a meaning to the statement that a corporation is incapable of malice. So long as this meant that a corporation could not be sued in tort for malicious conduct because it could not be guilty of malice, the proposition had a practical significance and was logically sound from the point of view of the Fiction Theory. But when it was held that the malice of the agent (through whom alone the corporation could act) could involve the liability of the corporation, then the metaphysical implications of the Fiction Theory ceased to have any claim upon the attention of the lawyer. Whatever theoretical qualification might be added to the construction by means of which the liability of the corporation was established, the practical result of the construction was that the corporation became liable in tort,

[1] *Citizen's Life Assurance Co.* v. *Brown*, *ibid.* at p. 426.

that it might be mulcted in damages; in short, that it was in the same position as if it had itself been adjudged guilty of malice. This point was more clearly admitted in *Cornford* v. *Carlton Bank*.[1] In that case Mr. Justice Darling (as he then was) expressed himself as follows:

'I am satisfied the prosecution was without reasonable and probable cause, and that the defendants (i. e. the Carlton Bank) were acting with malice, in the sense that they were actuated by such motives as would be malice in law, were they the motives of a private person.'

During the Great War an interesting and unusual case occurred which put the greatest strain upon the orthodoxy of the Courts and ended in the House of Lords overriding the law which it had itself expounded in *Salomon* v. *Salomon & Co.* In *The Continental Tyre and Rubber Co., Ltd.* v. *Daimler Co., Ltd.*,[2] the facts were these: The plaintiff company was incorporated in England and carried on business at its registered offices in London. It had a capital of £25,000 in £1 shares. It was formed as a subsidiary company by a German company, to promote the sale in the United Kingdom of tyres made in Germany by the German company. All its directors were German subjects resident in Germany, and the whole of its shares (except one) were held by German subjects residing in Germany. The question which the Court had to decide was whether this company was an English company and could as such sue the defendant company. The legal question upon which the decision of the Court depended was whether the plaintiff company remained an English company, in spite of the outbreak of war between England and Germany, by virtue of its being an artificial entity independent of its members. The question was a momentous one, and it can well be believed that the Courts which had to consider it had no desire to let any mere technicality suppress the obvious demands of public policy. But by a majority of five to one the Court of Appeal, affirming an order of the Master affirmed by Scrutton J. in chambers, considered itself bound to leave to the legislator the demands of public policy and to restrict itself to the application of what was clearly established legal principle. Although the House of Lords reversed the decision of the Court of Appeal, and took an entirely different view of the law, it is important to consider the judgements delivered in the Court of Appeal, for they enable us to contrast the orthodox theory of cor-

[1] (1900) 1 Q.B. 22.

[2] (1915) 1 K.B. 893.

porations with the wholly different theory contained in the judgements of the House of Lords. The principle which the Court of Appeal adopted was the principle of the Fiction Theory. The plaintiff company was an entity created by statute. It was 'a different person altogether from the subscribers to the memorandum or the shareholders on the register'.[1] It could not be technically an English company and substantially a German company, except by the use of inaccurate and misleading language. Once it was validly constituted an English company, it was an artificial creation of the Legislature, and it retained its existence as such for all intents and purposes. It was a living thing with a separate existence which could not be swept aside as a technicality. It was a legal body clothed with the form prescribed by the Legislature, and no change in the status of its members could affect its original destiny. Accordingly, five out of the six judges in the Court of Appeal held that The Continental Tyre and Rubber Co., Ltd., was an English company with a personality at law distinct from the personalities of its members and could therefore sue in the English Courts as a British subject.

It is significant that Lord Reading C.J. made a special point of distinguishing between the critical function of the legislator and the declaratory function of the judge.[2] It indicates that his Lordship, while having no doubt that the law he was expounding was the established law of England, felt grave doubts as to the soundness of that law from the point of view of a critical jurisprudence. And this fact is of greater importance for our present purpose than the fact that the Court of Appeal nevertheless felt itself bound to follow the path of orthodoxy. For it shows that while the Court left no doubt as to what the law was, it did not hesitate to indicate its disapproval of that law. In one judgement, moreover, the bonds of that orthodoxy were shattered and the dictates of a sounder jurisprudence recommended. Lord Buckley, in his dissenting judgement, held that the plaintiff company was not protected from the consequences of an alien nationality by virtue of its being an artificial person independent of its constituent members. His Lordship treated the company as a real person under the sway of the enemy, as a body corporate possessed of a definite character

[1] *Per* Lord Reading C.J. in *The Continental Tyre and Rubber Co., Ltd.* v. *Daimler Co., Ltd.*, *ibid.* at p. 904. Cf. *per* Lord Macnaghten in *Salomon* v. *Salomon & Co.*, *ibid.* at p. 51.

[2] *The Continental Tyre & Rubber Co., Ltd.* v. *Daimler Co., Ltd.*, *ibid.* p. 912.

and motive sustained by the dominant character and motive of its individual members. 'The artificial legal entity has no independent power of motion. It is moved by the corporators. It is the German corporators who, under the corporate name but still German for the relevant purpose of friendliness or enmity, is the person who comes. He is German in fact although British in form.'[1] Thus his Lordship considered it necessary and juristically sound to look behind the corporate person at the person of the corporator in order to determine the character of the corporation.

This is essentially the view which the House of Lords [2] took and which led it to reverse the judgement of the Court of Appeal. Lord Atkinson, Lord Parker of Waddington, Viscount Mersey, Lord Kinnear, and Lord Sumner held that the circumstances were such as to require investigation in reference to the control and management of the company, for these latter issues affected the quality of the company. The Earl of Halsbury held that the company was in substance a hostile partnership, and was therefore incapable of suing. The very different view which their Lordships were taking compared with that taken by the Court of Appeal appears very clearly in a passage from the judgement of Lord Parker of Waddington: [3]

'What is involved in the decision of the Court of Appeal is that, for all purposes to which the character and not merely the rights and powers of an artificial person are material, the personalities of the natural persons, who are its corporators, are to be ignored. An impassable line is drawn between the one person and the others. When the law is concerned with the artificial person, it is to know nothing of the natural persons who constitute and control it. In questions of property and capacity, of acts done and rights acquired or liabilities assumed thereby, this may be always true. Certainly it is so for the most part. But the character in which the property is held and the character in which the capacity to act is enjoyed and acts are done are not *in pari materia*. The latter character is a quality of the company itself, and conditions its capacities and its acts. It is not a mere part of its energies or acquisitions, and if that character must be derivable not from the circumstance of its incorporation, which arises once for all, but from qualities of enmity and amity, which are dependent on the chances of peace or war and are attributable only to human beings, I know not from what human beings that character should be derived, in cases where the active conduct of

[1] *The Continental Tyre & Rubber Co., Ltd.* v. *Daimler Co., Ltd.*, *ibid.* at p. 918.
[2] (1916) 2 A.C. 307. [3] (1916) 2 A.C. at p. 340.

the company's officers has not already decided the matter, if resort is not to be had to the predominant character of its shareholders and corporators.'

It is impossible to reconcile this decision of the House of Lords and the grounds on which it was given with the judgement in *Salomon* v. *Salomon & Co.* It should, of course, be remembered that it was a 'war-time decision', and such a decision usually invites some suspicion. But whether it was a good or a bad decision in law, it was certainly a decision which brought the law of England in touch with a sounder view of corporations. It involved the recognition that the group of living corporators which constitutes the social substratum of the corporation is an essential element of its legal personality. The Fiction Theory, on the other hand, treats this social substratum as irrelevant to the constitution of the corporate person which it regards as an artificial entity created by the Legislature.

This tendency to treat the legal personality of a body corporate as bound up with its character as a social fact has developed so strongly that it promises to destroy that characteristic maxim of the Fiction Theory—*universitas non delinquit*.[1] Thus we read in *The Representation of the People Act* (*No. 2*) of 1922,[2] which deals with corrupt practices at elections, that:

'Where the person guilty of an offence against this section is a body of persons corporate or unincorporate, every director or officer of that body shall, unless he proves that the act constituting the offence was committed without his knowledge or consent, be guilty of the like offence.'

The Fiction Theory which distinguishes between the person of the body corporate and the persons of its members makes it possible for the latter to take safe cover behind the intangible entity of the former. But the principle upon which the *Representation of the People Act* of 1922 is based is clearly that the body corporate is not something apart from its members, that its

[1] '. . . a corporation cannot commit treason, or felony, or other crime in its corporate capacity, though its members may in their distinct individual capacities.' Blackstone, 10 Rep. 32.

On 10 January 1927 the magistrates at Bridgend committed Messrs. Cory Bros. & Co., Ltd., a colliery company, on a charge of manslaughter. It was supposed that the *Criminal Justice Act*, 1925, rendered this possible. But on 28 February 1927, at the Glamorgan Assizes, the indictment was quashed. See *The Times*, 11 January and 1 March, 1927.

[2] St. 12 & 13 Geo. V, c. 41.

guilt can be their guilt, its responsibility their responsibility. True, it does not import the guilt of the individual director or officer unless the requisite *mens rea* was present in the mind of that director or officer. But neither does it permit a guilty corporator to take cover behind an artificial entity which is adjudged as the author of the crime and at the same time by its nature incapable of being guilty thereof. Though the difficulties which beset the criminal prosecution of a body corporate are by no means finally overcome by the simple enunciation of the principle on which the *Representation of the People Act* of 1922 is based, it is at least a principle which opens a possible way for their solution. It does not, as the Fiction Theory would do if it attempted to deal with the criminal liability of bodies corporate, lead us into the absurdity of applying physical compulsion to a person who has no real existence. Treby, a solicitor-general in the seventeenth century, gave an amusing but none the less fair illustration of the possible result if the Fiction Theory were applied where a body corporate is indicted for treason:

'Suppose,' he said, 'that they under their common seal should commit treason, and you bring an indictment of treason against the mayor, commonalty and citizens of the City of London, what judgement shall be given against them in their corporate capacity? What? It shall be that—*suspendatur per collum corpus politicum*. And then what execution shall be done upon that sentence? What? Must they hang up the common seal?' [1]

In contrast to this ludicrous conclusion to which the Fiction Theory leads us, the principle underlying the *Representation of the People Act* of 1922 affirms what is agreeable both to common sense and to the wisdom of social science, that if physical compulsion is to be brought against a body corporate, it must be brought against its officers or its individual members. This is what the Court decided in *Rex* v. *Poplar Borough Council*.[2] In that case the Poplar Borough Council had refused to pay certain rates assessed upon it by law. The problem which the Court had to face was how the Council could be coerced. The problem was solved by imprisoning those of the councillors who had voted for the unlawful resolution, but not those who had voted against it.

The above cases deal only with what are technically known as

[1] *Quo Warranto Case* (1681), 8 St. Tr. 1039, 1138.
[2] (1921) 38 T.L.R. 5.

incorporated associations, that is, associations upon which the state has conferred legal personality either by charter from the Crown or by statute. But the distinction between incorporated and unincorporated associations has lost much of its original importance.[1] The reason for this again lies in the fact that in practice, if not in theory, the Fiction Theory has been superseded by a wider and more realistic theory of corporate personality which still requires clear definition. So long as the Fiction Theory is strictly adhered to, the rights and privileges incidental to the personification of an association can be attributed only to those associations which have obtained personality by a *concession* of the state. But our law now recognizes certain associations, which are not incorporated, as enjoying even greater corporate rights and privileges than incorporated associations. These associations are the trade-unions which, more than any other associations, promise to force the issue of corporate personality. Technically they are known as *quasi-corporations*, because, on the one hand, they are not incorporated, but, on the other hand, by statute they enjoy certain rights and privileges which give them the character of corporations.[2] But the very term *quasi-corporations* shows that the law has found itself bound to admit corporateness where the Fiction Theory cannot admit it. Strictly, the Fiction Theory cannot admit any kind of association in between the *universitas* and the *societas*, in between the corporation created by the act of the state and the partnership

[1] See Smith, *Law of Associations*, pp. 142–3. *Vide Attorney-General* v. *London County Council* (1901), 1 Ch. 781 (C.A.), and *Bonanza Creek Gold Mining Co., Ltd.* v. *Rex* (1916), 1 A.C. 566.

[2] By the *Trades Disputes Act* of 1906 (Edw. VII, c. 47, s. 4), trade-unions inducing a breach of contract in furtherance of a trade dispute are exempt from liability in tort. This Act was prompted by the famous case of *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* (1901), A.C. 426, in which it was held that if the trade-unions had been invested by statute with certain corporate privileges, they had thereby been invested with corresponding liabilities, and that therefore the defendant trade-union was responsible for tortious acts committed by its agents or members.

The House of Lords has gone so far as to uphold a decision of the Court of Appeal that a trade-union cannot be held responsible for any tort committed by it or on its behalf, even if it is not committed in furtherance of a trade dispute. *Vacher* v. *London Society of Compositors* (1913), A.C. 107. The danger of the law as it therefore stood may be gathered from the remarks of Lord Justice Farwell in the Court of Appeal. In dissenting from the judgement of the Court he said that it gave trade-unions 'a licence to commit torts and to inflict losses and misery on all or any of his Majesty's subjects as long as they please, without responsibility'.

which remains a purely contractual relationship between distinct individuals. It sees corporateness only where the state has created a fiction and not in the inherent logic of social fact. But the pressure of that logic has been too strong, and in the matter of trade-unions the law has had to sacrifice its classic theory of corporations to the irresistible demands of social realities. It has had to go beyond the contemplation of mere legal forms to the social realities which they clothe, and has in practice, if not in explicit theory, admitted that the legal character of associate life cannot be judged by considering only its legal or formal aspect, but must be judged also in respect of the social elements which are its real substratum.

These quasi-corporations present, however, a peculiar class of unincorporated associations.[1] All other such associations are treated by law as species of contractual relationships into which the idea of corporate personality does not enter. In so far as these bodies do require treatment as more than a collection of independent individuals and rather as presenting a certain corporate character, English lawyers claim to have found the necessary means of doing so in the doctrine of the trust. Now, from the legal point of view, any unincorporated association originates in contracts between each and all its members, the terms of which are contained in its rules of association.[2] Usually this view offers adequate machinery for the life and legal treatment of an unincorporated association when it does not possess property. But when it does possess property, and this property is meant to be used for the purpose of the association, the idea of contract is insufficient to give it a satisfactory legal form. It leaves the property at the mercy of those who happen to be the members of the association. It does not insure that the property which the founders of the association donated to it shall be applied only in furtherance of the purposes they had in mind. To overcome this difficulty the property is vested in *trustees*, whose business it is to apply the property only for the purposes of the association.

It cannot be denied that the trust has been and is an extremely useful legal device. But that, as lawyers are wont to claim, it has

[1] Other quasi-corporations besides trade-unions are friendly societies, industrial and provident societies, and registered working-men's clubs.

[2] 'In its anxiety to avoid a fictitious person the law has been driven to imagine myriads of fictitious contracts.' H. A. Smith, *Law of Associations*, p. 19.

shelved entirely the conception of corporate personality so far as unincorporated associations, other than quasi-corporations, are concerned, can be maintained only if we take a thoroughly uncritical view of its results. We should first bear in mind that though these associations do not enjoy the exalted position at law which incorporated associations possess, they nevertheless include a variety of bodies some of which have a greater social importance and play a more vital part in the life of the community than their legally more exalted brethren. They include not only the transitory and comparatively unimportant partnerships in commerce but also such permanent and vital institutions as churches. If we were to pursue a minute criticism of the trust, we should not find fault with it as a legal device to be used in certain circumstances but should criticize it in so far as it is supposed to be an adequate device for the legal treatment of all unincorporated associations. That it is an adequate and valuable device when the association in question is an ordinary profit-making concern is undeniable. But that it should be equally satisfactory in the case of a church is the kind of view that comes of thinking of law only in abstract and formal terms, and not taking into account the social problems which it has to solve. It is prima facie absurd to suppose that the law should treat a church as it treats an ordinary commercial concern, when in both cases the funds of the association are vested under a trust for certain purposes. But we need not, on this point, appeal to social wisdom. Parliament has given a verdict on it which should command the most careful attention of jurists and lawyers alike.

In the well-known *Free Church Case*,[1] the House of Lords gave judgement to the effect that the ordinary doctrine of the trust applied strictly to the property of the Church. The Free Church of Scotland came into existence in the Disruption of 1843, when many Scotch Presbyterians became dissatisfied with the constitution of the Established Church. A large sum of money was collected from the members of the new association and vested under a trust for the furtherance of certain religious doctrines. Later a great majority of the Church favoured union with another body, the United Presbyterian Church, which had also seceded from the Established Church. But a small minority, the 'Wee

[1] *Free Church of Scotland* v. *Overtoun* (1904), A.C. 515. A complete account of the proceedings in this case may be found in Orr's *Free Church of Scotland Appeals*.

Frees', refused to do so on the grounds that such union would involve a compromise on certain doctrinal matters of fundamental importance, and that it would therefore be a violation of the trust under which the property of the Church had been vested, if that property were allowed to pass to the proposed new union. The House of Lords took a more rigid and literal view of the matter than the Scottish Court of Session, and upheld the contention of the minority that the property could not pass, for if it did it would violate the trust which ruled its use.

The points in the judgement of the House of Lords to which we would draw attention are two. The one concerns the refusal of their Lordships, who favoured the judgement, to treat the beneficiaries of the trust, the living members of the Free Church, as an essential element in the social fact for which the trust provided the legal form. The other concerns the burden which their Lordships, perhaps unconsciously, took upon themselves in deciding an issue which was purely one of religious doctrine.

The first point was brought out with more fervour than usually graces legal judgements by one of the dissenting judges, Lord Macnaghten:

> 'Was the Free Church by the very condition of her existence forced to cling to her Subordinate Standards with so desperate a grip that she has lost hold and touch of the supreme standards of her faith? Was she from birth incapable of all growth and development? Was she (in a word) a dead branch and not a living Church?' [1]

Lord Macnaghten refused to treat the trust, under which the property of the Free Church was vested, as a trust for an immutable and impersonal purpose. He held it necessary to take into account the living society in whose will the purpose of the trust lived and found expression. And therefore he held that the purpose of the trust could grow and develop with the growth and development of the society which was founded for it. But Lord Halsbury and the majority of the Court saw in the trust only an

[1] (1904) A.C. p. 631. It is to be noted that Lord Macnaghten refers to the doctrines in dispute as 'Subordinate Standards'. We cannot but consider this an unintentional error on the part of Lord Macnaghten, for the essence of his dissenting judgement is that the Court has no power to judge as to whether any doctrine that the Church holds is or is not fundamental. In his Lordship's own words, 'the Free Church has rejected the ordinances of men and the authority of Parliament'.

impersonal document to the contents of which the trustees must adhere strictly and so long as the trust existed.

We are not discussing whether the judgement was based upon a sound interpretation of the actual law of Scotland.[1] We are concerned only to point out the grave deficiency of the 'Trust', as their Lordships interpreted it, when applied to unincorporated associations such as religious societies. The rigid limits within which it encloses the life of an association allow that life no room for natural growth and expansion. It sees only static form where there is dynamic life. It ensures stability of purpose at the expense of cramping the development and energies of the living organism which exists for that purpose.[2] We should not therefore wonder at the indignation with which the majority of Free Churchmen received the judgement of the House of Lords, for it denied them any real autonomy in the determination of their spiritual life as an association, and passed sentence of death on the vital institution of the Church. Maitland supplied a fitting epitaph when he wrote that 'the dead hand of the law fell with a resounding slap upon the living body of the Church'. But it was not only the moral censure of jurists that was passed on the law. The judgement of the House of Lords was so clearly contrary to the social conscience of the community, and so obviously impracticable, that Parliament had to pass an Act destroying its effects.[3] This means that the Legislature has virtually admitted the inadequacy of the Trust as an instrument for the legal treatment of an important type of unincorporated association. We should, however, note that the general principle of the law of unincorporated associations remains unchanged in

[1] It makes no difference that the case was a Scottish Appeal. The views expounded by the House of Lords would not have differed if the Appeal had been from an English Court. The Doctrine of the Trust which their Lordships had to consider, and which they interpreted, is common to the laws of England and Scotland.

[2] Cf. Lord Shaw's remarks in *Osborne* v. *Amalgamated Society of Railway Servants* (1910), A.C. p. 107: 'I have some hesitation in so construing language of statutory recognition as a definition imposing such hard and fast restrictive limits as would cramp the development and energies and destroy the natural movements of the living organism.'

[3] *The Churches* (*Scotland*) *Act*, 1905, 5 Edw. VII, c. 12, divided the property of the Free Church among the two disputing parties in the Church, in accordance with the proportion of adherents which they had in each district. Section 5 of the Act gives the Established Church of Scotland the power to alter its own formulae. It should be noted that the alteration of trusts by Act of Parliament is not uncommon.

spite of this admission, and lawyers do not expect any early change of it to come by the efforts of the Legislature.[1]

The other point in the *Free Church Case* deserves even more critical attention. Had their Lordships, who supported the decision of the House of Lords, been willing to see in the beneficiaries of the trust a living society they would have avoided the embarrassing task of deciding a religious dispute. They would then have found evidence as to the continued identity of the Free Church in the fact that the great majority of Free Churchmen, who were in favour of union with the United Presbyterian Church, did not consider that they were ceasing thereby to be true members of the original Free Kirk. But under cover of the purely legal question of whether or not a trust had been violated, their Lordships actually decided the doctrinal dispute at their own discretion. In other words, a court of law, the state in its judicial capacity, took upon itself the right, and indeed, considered itself in duty bound, to dictate to the Free Church how it must direct its religious life, and within what limits it might regulate its spiritual formulae. The issue raised was thus one which profoundly concerned not only the Free Church but any church of any denomination which valued autonomy in its spiritual life. That Parliament came immediately to the assistance of the Free Church did not take the sting out of the House of Lords' judgement or heal the wound it had inflicted on the living body of the Church. The action of Parliament gave the Free Church its property, but it did not deny what the Free Church most wanted it to deny, the principle implied in the House of Lords' decision, that the state has power of control over the spiritual life of the Church. That it had exercised control only over its property was not all that the decision implied, for the spiritual life of the Church was bound up with the disposition of its funds. That is why the *Free Church Case* raised a storm of indignant criticism from the bosom of all religious organizations and gave a new urgency to the vital problem of the relation between churches and the state.[2]

Nowhere, however, has the Fiction Theory failed so miserably to solve the problem of corporate liability as in the case of the state itself. It is an obvious implication of the Fiction Theory, which

[1] *Vide* Smith, *ibid.*, p. 20.

[2] The most celebrated work which the *Free Church Case* prompted is that of Dr. J. N. Figgis, *Churches in the Modern State*. This work is one of the most valuable treatises on many of the problems discussed in this work.

we shall later examine at length, that the state cannot itself be subject to the laws which it prescribes for its subjects. Corporate personality, which sustains the legal subjectivity of a body corporate, is a fiction the author of which is the sovereign state. It is a creation of the state and is bound by the obligations put upon it by its creator. But the creator, the state itself, stands above any such obligations. It is a law unto itself. It cannot be a subject of duties; it is only a subject of rights. It cannot therefore be sued. It has its existence in the exclusive world of its absolute sovereignty, where no writ can run and rules of law become empty formulae. This is precisely how matters stand in England to-day. The Crown (which is how the state defines itself on such occasions) appears as a litigant only when *as a matter of grace* it condescends to appear as such. In theory it is not responsible for breaches of contract, and the only remedy of the party who has suffered by such breaches is to present a *petition of right* which the Crown considers only as a matter of grace. As for any liability in tort, the Crown is completely immune. As it is said, 'The King can do no wrong', and 'the King' has here come to mean also the Crown.

The critical jurist need make no further comment on this state of affairs than to point out that it leaves a large sphere of social and political relations free from that rule of law on which this country prides itself. It fails completely to protect the subject from the most powerful of all possible opponents. Where it should put well-defined legal obligations upon the Crown towards its subjects, it merely provides a procedure by which they may humbly pray that the Crown will have the grace to do what is morally right. And if we drop the veil of metaphor, this will mean that the petitioner will have to rely upon the good grace of some Secretary of State or head of state department. A striking illustration of the arbitrary consequences of this system and the grave injustice to which it can give rise is the recent case of Oscar Slater. After serving a sentence of penal servitude for almost nineteen years as a convicted murderer, Mr. Slater's conviction was quashed by a Scottish Court of Criminal Appeal. The generosity of the Crown found its expression in the sum of £6,000, which was considered an adequate recompense for the pain and terror which he had been unjustly made to suffer! In 1896 and in 1904 Adolf Beck was twice wrongly convicted on charges of obtaining by false pretences. He served a sentence of five years' penal servitude, and he would have

served more had it not been for the happy discovery of the real author of the crimes which he was thought to have committed. He received a free pardon from the King, and the Crown awarded him the sum of £2,000 as recompense for his sufferings. A public outcry against the insufficiency of this sum resulted in its increase to £5,000. These facts require no comment. They are in themselves a sufficient testimony to the evils of a system which makes it impossible to sue in tort the greatest of all corporations.

The above cases raise many diverse problems and cannot of course be treated in precisely the same manner. But they one and all point to the same fundamental fact about law, that it is always ultimately concerned with social problems. Its aim is to introduce order and justice into the life of the community, and it cannot therefore remain indifferent to the real character of those facts on which it puts a legal construction. It cannot remain at the contemplation of mere legal forms and technical devices, but must take into account the social realities which they construe. Certainly, law and life are not the same thing. On the one hand, law rules only a portion of human life; on the other, it has to put a special construction upon that portion which it does rule. But if law and life are not identical, it is equally true that they are not indifferent to one another. Law is a special interpretation of social life, and it must somehow be fashioned in accordance with the inherent character of that life. Its technical constructions must have their foundation in the logic of social fact. Legal theory cannot, therefore, be divorced from social theory. The judgements of the law are always judgements about social facts, and therefore they cannot disregard whatever is essentially relevant to the operation of those facts as social forces, without producing legal constructions which cramp their action and effect an impossible disharmony between the law and the life it governs.

These must be the contentions of any sound jurisprudence about the entire field of legal activity. It is, however, only in reference to the legal treatment of corporate bodies that we are here concerned to emphasize their importance, and as the cases which we have quoted show, they are of particular importance in this matter. In dealing with a corporate body the law has to consider not merely formal legal constructions but also the living social realities which they construe. It has to consider not legal forms alone, but their social contents as well. Our law has struggled and still struggles

hard to follow the purely formal directions of the Fiction Theory, with the result that the accepted theory underlying our law of associations is in essential disharmony with the facts of social life. That it has frequently disregarded the theory in practice is no tribute to the theory, but simply indicates that it should and will have to go by the board.

But some new theory will have to take its place. Even if 'we fear the petrifying action of juristic theory',[1] we must face the fact that we cannot do without it. So long as this fear is directed against *too much theory*, it is a healthy sign and undoubtedly expresses something fundamental in the English mind. But when it takes on the character of *aversion to all theory*, it produces a hopeless attitude of mind which is simply uncritical and unconstructive.[2] Our legal experience should by now, at any rate, have taught us that there is also a petrifying action of legal practice when that action is supported by too little juristic theorizing. If profounder theory had been brought to the making of our law of associations, we should not now struggle pathetically to apply the untenable Fiction Theory to incorporated associations, nor should we be applying the rigid doctrine of the trust to all unincorporated associations regardless of their inherent character as living social realities.

It is upon the conviction that nothing can be done towards a thorough solution of the complex and difficult problems which attend the legal treatment of corporate bodies until certain fundamental principles of legal thought have been thoroughly stated and understood that this work has been written. As we have already said, the problem of corporate personality is inseparably connected with the entire question of the relation of law and state, and that is why it cannot be discussed without considering certain fundamental questions of legal philosophy. But this is so much a point which we seek to prove rather than a point on which every one is agreed, that we shall leave it to be substantiated by the whole body of the work.

It is, however, necessary to say something more here to explain what is meant by 'the fundamental questions of legal philosophy'. Legal philosophy or, as we prefer to call it, jurisprudence is a term used to cover a very wide field of inquiry. We have but to observe

[1] Maitland, *Collected Papers*, vol. iii, *Trust and Corporation*, p. 369.

[2] This attitude, in so far as it is that of the pragmatist, is discussed *infra* in part ii, especially ch. i.

how varied is its literature, and how different may be the interests of those who call themselves jurists, to realize that jurisprudence has no well-defined limits. This is no cause for regret or criticism. It would be wrong to attempt to narrow down the scope of its inquiries by a cut-and-dried definition. By doing so we should misunderstand its essential character and preclude the real contribution it can make to the better appreciation of legal phenomena. The encyclopaedic interest which it inspires is a source of richness for juristic knowledge, for the loss of which no amount of systematization could atone. The crystallized definition of the scope and interest of juristic science had therefore better be left to the tracings of time.

It is, on the contrary, on the encyclopaedic character of jurisprudence that we should to-day insist, for it is from too formal and narrow an interest in juristic problems that the efforts of jurists mostly suffer. If once we recognize that legal problems are social problems, and that law is itself a social phenomenon, we must admit that the various social sciences have a claim upon the respect and attention of the jurist.[1] Particularly is this the case where the jurist is concerned with so fundamental an issue as the conception of corporate personality. On this question he does not hold the field alone. Other sciences, such as political science, psychology and sociology, have also an interest in it, and although they cannot solve the problem with which he is *par excellence* concerned, whatever they may have to say must receive his attention.[2] This is but a corollary of the fact that the problems of law are social problems. It is inevitable, therefore, that a juristic work should lack a certain systematic arrangement of its contents. In the degree to which its inquiries are spread over a wide field, it must offer a discursive, rather than a formally coherent, treatment of its subject. And this will necessarily be the result in this work. Its apparent lack of systematic arrangement has indeed been deliberately tolerated in order not to restrict in any way the consideration of the many aspects of its problem. If, however, any exception is taken to this feature of the work, it is a sufficient defence to point out that it does not pretend to offer any final and

[1] On the relation of jurisprudence to the various social sciences, see Vinogradoff, *Historical Jurisprudence*, vol. i, pp. 61 ff. See also Korkunov, *Theory of Law* (English translation by W. G. Hastings).

[2] See Geldart, 'Legal Personality', *Law Quarterly Review*, vol. xxvii, 1911, p. 90.

exhaustive solutions to the many difficulties of the lawyer in his treatment of corporate bodies, but endeavours only to state and explain the lines on which those solutions should be sought.

The arrangement of the work is mainly one of convenience, but it expresses a certain order based on principle in so far as it moves from theories which are less, to those which are more, acceptable to the writer. Accordingly, it falls into three parts. The first part deals with Rationalistic Theories, which err through being too formal and abstract. The second part deals with Sociological Theories, which err in confusing the juristic with the sociological account of society. A separate chapter is given to an excursus into the field of modern social science. It discusses the contributions of social science to a knowledge of the social realities with which law deals, and so forms an introduction to the third part of the work. This deals with Juristic Theories which, while admitting that juristic theory must be based upon sound sociological theory, do not confuse the two. The results arrived at are summed up in a Conclusion. But the reader must be warned that this summary does not and cannot adequately indicate the contributions which a work like the present may make to the knowledge of its subject. These must be sought in the text itself.

PART I
RATIONALISTIC THEORIES

I

THE FICTION THEORY: F. C. VON SAVIGNY AND A. V. DICEY

Controversy as to Roman theory of associations — Savigny and the Roman law — his individualism — his account of the fictitious character of corporate persons — its practical consequences: in private law, in public law — its effect on the distinction between public and private law — Concession Theory — Savigny's theory of the state — distinction between political and legal issues — Dicey's rationalism — his theory of legal sovereignty — his distinction between political fact and legal fact — Austinian sovereignty criticized — merit of Austinian jurisprudence — conception of sovereignty — imperative character of law — Duguit on sovereignty — sovereignty an essential aspect of juridical organization — Summary.

IF we proceed to study the Roman law of associations we are at once confronted by an important historical controversy. According to the Romanist school of Savigny, the Roman lawyer was always the strict adherent of the traditional Fiction Theory. According to Saleilles and others, the Fiction Theory was essentially an invention of modern times, and so far as it does appear to be implied in the texts of Roman law, it was merely the rather scanty theoretical clothing given to certain facts of which the Roman lawyer had a realistic appreciation. This difference of opinion is the result of two radically different ways of approaching Roman law. Savigny, and more especially his followers, considered the Roman mind to be essentially logical, a mind unsurpassed, indeed, in its desire for logical rigour. Saleilles, on the other hand, held that this supposed logical rigour was an invention of modern times. The Romans were not reflective thinkers. They were stern pragmatists—men of great practical experience who made expediency their watchword and accepted the pressure of social necessity as their guide. According to Saleilles then, if we wish to know the true Roman view of associations, we must go to the details of their practice as witnessed by their legislation, and be wary of accepting clear-cut logical theories as true accounts of that practice.

There is no doubt that we can get one account of the Roman theory of associations if we view it with Savigny, another if with Saleilles. But it is not our concern here to inquire into their respective merits from the historical point of view. Our immediate pur-

pose is to examine a theory which later ages chose, rightly or wrongly, to treat as the peculiar legacy of Rome in regard to the theory of associations. This is the famous Fiction Theory which Savigny set forth in the second book of his great work on the Roman law.[1] Though it may not be all that the Roman lawyer thought about the legal nature of associations, and even though it may have been, as Saleilles contends it was[2], quite unknown to him, it is certainly a theory which fits in with the general principles of Roman jurisprudence. Undoubtedly, this point weighed heavily with Savigny, for he was looking for systematic unity of principle in the *Corpus Iuris*. Yet it is difficult to understand how Savigny could so easily attribute to the lawyers of Rome a polished theory which they never defined explicitly and which so clearly bears the imprint of later ages. Savigny was the founder of the so-called Historical School of Law, which held that law is not simply a creation of conscious thought but essentially the product of an organic growth. In opposition to the dogmatic jurisprudence of his day, he asserted that the logical analysis of abstract concepts could not explain the nature of laws; this could only be achieved by the investigation of their historical origin and development. One would therefore expect him to have refrained from reading nineteenth-century ideas into the ancient texts. But there was another side to Savigny the jurist, that of the dogmatic thinker, the ardent admirer of Roman law calling upon jurists to abandon the efforts of glossators, commentators and other interpreters of the original Roman texts and to return to the unprejudiced study of the texts themselves. This explains why he would readily attribute to them a theory which appeared to him sound from the standpoint of a critical jurisprudence. At any rate, it is difficult to maintain that the Fiction Theory, which Savigny expounded in the fullness of all its logical implications, may be found in the rules of the *Digest*. We shall therefore probably be nearer historical accuracy, and in any case avoid the controversial issue of the historian, if we speak of that theory as Romanist rather than Roman.

At the beginning of Savigny's treatment of juristic persons we find a statement which gives us the key to the entire system of his jurisprudence. 'All law exists for the sake of the moral freedom indwelling in every man. Therefore the original idea of a person,

[1] *Das System des heutigen römischen Rechts* (1840).
[2] *La Personnalité Juridique* (2nd ed.).

or of the subject of a right, must coincide with the idea of man, and this original identity of both ideas may be expressed by the following formula: every individual man, and only the individual man, is jurally capable."[1] In adopting this individualistic viewpoint, Savigny claimed that he was following the Roman law. The only *persona certa* which the latter recognized was the individual human being. For example, in its law of testamentary succession the view was carefully guarded that only the individual human being could inherit.[2] Furthermore, the essential attribute of a *persona certa*, a natural subject of rights and duties, was held to be the possession of a will. Hence the individual, who alone possessed a will, was alone capable of entering into the various modes of acquisition. This individualistic point of view was as old as the Twelve Tables, and Savigny maintained that in principle the Roman lawyer never abandoned it. That it should have impressed the early jurists is intelligible. Rome, from the fourth and third centuries B.C., witnessed a movement of internal disintegration. The old divisions of the *gentēs* were breaking down, and the family was receiving shocks which were gradually weakening the absorbing power of the *paterfamilias*. It was an age of individual emancipation. Rome was shaking off the fetters of tribal organization, and human individuality was obtaining a new recognition. It is therefore not surprising that the jurists of the period should have held an individualistic view of society. But neither is it surprising that this same view should have found a sympathetic adherent in Savigny. On the one hand, the world in which he lived was still reverberating with the Rights of Man doctrine. On the other hand, his great aim as a patriot and statesman was to achieve a united Germany, and thus he shared that distrust of associations within the state, which played such an important role in the political theories of the Revolution. Accordingly, Savigny proved a willing disciple of the individualistic theory of society which he found in Roman jurisprudence.

But Savigny knew that the individual human being was not the only social phenomenon with which the jurist had to deal. Even

[1] *Ibid.*, Bk. II, § 60.

[2] But this rule was relaxed in connexion with the *piae causae* of the Christian period. These church institutions brought about the introduction of entirely new principles. *Vide* Savigny, *ibid.*, § 93; Saleilles, *ibid.*, pp. 140 ff., and p. 219; P. W. Duff, *The Charitable Foundations of Byzantium* (Cambridge Legal Essays. Camb. 1926).

as early as the Twelve Tables[1] the Romans had found themselves confronted by the powerful fact of human association for a variety of purposes, and the corporate life and solidarity of action which it presented had forced them to take account of corporate bodies as entities which required separate legal recognition. Similarly Savigny's insistence on the individual as the only real subject of rights and duties did not close his eyes to the need of having some theory to account for the jural capacity which associations claimed and were granted at law. Indeed, the great amount of attention which he gave to this matter shows that he considered it of vital importance for any system of jurisprudence. But unfortunately this did not stimulate his critical sense. Throughout his treatment of juristic personality his attitude remained reactionary and dogmatic. He had adopted the Fiction Theory, and his lengthy exposition of it was simply intended to show that it was the theory implied in the *Corpus Iuris*. If, therefore, his work on the nature of corporate personality does not afford a critical study of the question, it does offer an admirably clear statement of the Fiction Theory which it is here our purpose to examine.

Having asserted that the idea of personality must coincide with the idea of man, Savigny forthwith proceeds to show that it is nevertheless capable of being restricted or expanded. The human being may be denied personality, as in the case of the slave; or personality may be attributed to something external to the individual human being, as in the case of an association or institution.[2] But, he immediately adds, the person which we thereby affirm is an artificial creation, an abstract concept, a fictitious being.[3] It has

[1] *Dig.*, 47, 22, 4. 'His [sodalibus] autem potestatem facit lex pactionem quam velint sibi ferre, dum ne quid ex publica lege corrumpant.' This fragment, reproduced by Gaius from the Twelve Tables, shows that at the time of the Twelve Tables associations enjoyed a freedom which they had not in imperial times.

[2] *Ibid.*, Bk. II.

[3] *Ibid.*, §§ 85–6, and § 86, note b. Savigny objects to using the expression 'moral person' (*personnalité morale*) because it does not touch the essence of the concept of juristic personality 'which has no connexion with moral (i.e. social) relations', § 85.

The texts on which Savigny bases his contention that the Roman Law knew and adopted the Fiction Theory, which he expounds, are chiefly these: *Dig.* 46, 1, 22, 'Hereditas personae vice fungitur, sicuti municipium et decuria et societas'; *Dig.* 4, 2; *Dig.* 3, 4, 7, § 2, 'In decurionibus vel aliis universitatibus nihil refert, utrum omnes idem maneant, an pars maneat, vel omnes immutati sint'; *Dig.* 1, 8, 6, § 1—where Marcian draws this careful distinction in regard to the property

no real existence like that of the individual person. It is 'an artificially assumed subject', to which the law attributes the capacity to hold property.[1] In private law this property-capacity is all that the juristic person presents. Every other aspect of its character, we are told, falls outside the limits of private law. Now this deduction is an essential part of the Fiction Theory, for it brings to light the real, as distinct from the apparent, foundations of the reasoning which leads Savigny to maintain rigidly that the juristic person is nothing more than a *persona ficta*. The juristic person is a fiction and its author is the state. Its personality is not inherent in it but *conceded* to it by the state, and therefore the foundations of its existence in the eyes of the law lie, not in the sphere of private law, but in the sphere of public law where the state creates those relations which it considers desirable and forbids those relations which it deems harmful.[2] Accordingly, in the sphere of private law the juristic person appears only as an artificial creation of the

of cities, 'Universitatis sunt, non singulorum'; *Dig.* 3, 4, 2, 7, § 1—where Ulpian supports this distinction.

Savigny deduces from these extracts that the Fiction Theory was in the minds of the Roman jurists. He admits that nowhere is the expression, *persona ficta*, expressly used. But, he says, when the Romans said that juristic persons represented the place of persons (*Dig.* 4, 2, and 46, 1, 22), this 'was tantamount to saying they are feigned persons'. Savigny, *ibid.*, § 85.

Saleilles disagrees with this view. He emphasizes the fact that the Roman jurists never used the expression *persona ficta*, and holds that they never entertained the conception. He quotes other extracts from the Roman texts to show that Roman law admitted many practices inconsistent with a liberal application of the Fiction Theory, e.g. *Dig.* 47, 22, 182. He further shows that the Romans did not deduce all the logical implications of the Fiction Theory as modern French law has done, e.g. the Principle of Speciality, *vide* Saleilles, *ibid.*, p. 113. Contrary to Savigny's estimate, Saleilles says of the 'fiction' that, so far as the Romans entertained the idea of it, 'it was, if one may say so, a fiction intended to lead to the acceptance of the reality, and not to its denial and suppression'. *Ibid.*, p. 113.

According to Gierke, the Fiction Theory was first explicitly and clearly formulated in the thirteenth century by Pope Innocent IV, interpreting the texts of Roman Law handed down by the glossators and the commentators. He was the first to use the expression *persona ficta* and to apply it directly to the 'universitas'. *Vide* Gierke, *Genossenschaftsrecht*, vol. iii, p. 279. This Fiction Theory passed into the laws of France and Germany, though, as Gierke shows, in Germany it had to contend with an indigenous theory of corporate personality which it by no means vanquished and which was later to gain the ascendancy.

[1] '. . . ein des Vermögens fähiges künstlich angenommenes Subjekt.' *Ibid.*, § 85.

[2] This is the theory of juristic capacity on which the law of Soviet Russia is based. *Vide* Leopold Wenger, 'Zum Zivilrecht Sowjetrusslands', *Archiv für Rechts- und Wirtschaftsphilosophie*, 1926, Band xx, Heft 1, pp. 20 ff.

legislature and enjoys only those rights which the legislature has attributed to it. That these rights should be only those co-extensive with a property-capacity follows from the unreality of the juristic person. It has neither will nor self-consciousness. It is a dead form, not a living reality, a concept which can enter into jural relations only so long and in so far as the state breathes into it the vital power of jural capacity. And the state is a powerful creator of such persons. But as Savigny shows, if the state is not bound by any legal restrictions, it is necessarily bound by the inherent limitations of the artificial beings which it creates. It can attach to these beings a right of ownership in certain property. But if it attempts to go further and attributes to them all the rights and obligations which natural persons enjoy, it errs in theory and invites practical absurdities. The artificial person which the state creates has no will, no mind, and these the state cannot grant it. Accordingly, it is incapable of the *mens rea* which is essential if any action for tort or crime is to lie against it. The rights of ownership which a juristic person enjoys can be exercised for it by a representative in the same way as the rights of a pupil are exercised for him by a guardian.[1] But in the same way that the torts and crimes of the guardian cannot be imputed to the pupil, the torts or crimes of its representative cannot be imputed to the juristic person. It is a fiction, and fictions cannot commit torts or crimes.

Savigny does not shirk the task of defining the serious practical consequences which follow from this implication of the Fiction Theory. On the contrary he defines them as if they were the necessary conclusions of a sound jurisprudence. 'It is only through its juristic object that the juristic person has any existence as a person.'[2] This juristic object is the purpose for which the state has created it. As soon as it acts with a view to any other purpose it acts *ultra vires*, and as such it ceases to exist in the eyes of the law. It cannot be punished for such acts, for it cannot be held responsible for that which by definition it is incapable of doing. This Savigny claims to be good law and sound common sense. It is good law because it recognizes the 'purely juristic character' of the juristic person; it is sound common sense because it does not involve the absurdity of applying material compulsion to a fictitious being, which, as an English judge has observed, 'has neither

[1] *Ibid.*, § 90 and § 92. [2] *Ibid.*, § 85.

a body to be kicked, nor a soul to be damned'. We have already observed that legal practice has gone beyond the limits of this view.[1] It has brought juristic persons within the law of torts, and is no longer so dogmatic in its refusal to countenance their criminal responsibility. Any attempt to reconcile the Fiction Theory with these new departures in legal practice can only produce sophistical arguments which are of little value and certainly of no interest here. The important thing to notice is the reason why the Fiction Theory is so hard pressed to follow where practice has advanced under the pressure of irresistible facts. This reason lies in the absolute separation which the theory makes between the juristic person and the living association to which it gives juristic expression. According to Savigny, the essential quality of a corporation consists in this: 'that the subject of the right does not exist in the individual members thereof (not even in all the members taken collectively), but in the ideal whole.'[2] The juristic person, that is, has nothing whatever to do, juristically speaking, with the living association of men to which it gives juristic form. From the legal point of view the individualities which compose the association as a social fact are not constitutive of it as a legal fact. They are of interest to the legislator; they do not concern the lawyer. The social fact of their corporate life is certainly the stimulus which prompts the state to create a juristic personality for it, but as such it is a mere *raison d'état*, a political fact to which the courts must show a polite indifference. The legislative act of the state alone can convert this political fact into a legal fact. Accordingly, the lawyer does not recognize a corporate person which is the product of the associative life of so many individuals; he recognizes only a juristic person which the legislature has *created*. The key to the nature of this legal subject will therefore lie in the implications of the law which has created it, not in the character of the association as a living fact. Thus if politically this law is the outcome of a living social force, the associative movement of individuals, juristically its effect is to put in its place a legal skeleton, a concept devoid of life, a form which has no essential connexion with the facts it should fit. It follows that the Fiction Theory must necessarily fail to produce a satisfactory

[1] *Vide supra*, Introduction, pp. xliv ff.

[2] *Ibid.*, § 86; and § 94, '. . . confounding the juristic person with its individual members, a confusion which the Roman law most distinctly opposes in numerous applications'.

account of corporate responsibility. It permits the members of the association to take safe cover behind the *persona ficta* for which the law creates rights but to which it cannot attribute obligations.

If, however, the Fiction Theory proves inadequate to deal with the demands of practice within the sphere of private law, it is in the sphere of public law that its extremely dangerous character becomes evident. It is, indeed, its effects on public law and constitutional law that furnish the real starting-point for its criticism, for, as Saleilles points out, 'the Fiction Theory is not a theory of private law but of public law disguised under the concepts of private law.'[1] This remark is particularly suggestive, for it brings out the important implications for jurisprudence and constitutional law contained in the Fiction Theory. The theory gives a special connotation to the distinction between public law and private law. Ulpian, speaking of the *study* of Roman law, wrote: 'Huius studii duae sunt positiones, publica et privata. Publicum ius est quod ad statum rei Romanae spectat; privatum quod ad singulorum utilitatem.'[2] This does not suggest that the distinction was anything more than one drawn for the sake of convenient study (*studii*). It certainly meant that law can be looked at from two points of view; it did not mean that law can be cut in two. But the Fiction Theory gives it another meaning. It makes it signify a distinction inherent in the law itself, by virtue of which public law is superior to private law. This may be clearly observed in Savigny's work. In spite of the exalted position of the individual as a subject of rights in his jurisprudence, he denies the individual a very precious right—the right of free association. This right is, in Savigny's system, something derivative and not originally inherent in the individual, as, for example, the right to make a contract. Under the latter the individual can proceed with the making of the contract and count on legal protection without the previous sanction of the law or law-giver. But before the individual can at law constitute in conjunction with others an association capable of acting in a corporate capacity, it is above all necessary to obtain a concession from the state. Only then can it act as a juristic person within the sphere of private law. The effect of the Fiction Theory is therefore this: so far as associations are concerned, private law applies only where public law has given its blessing. So far, private law is the meek child of public law. Accordingly,

[1] Saleilles, *ibid.*, p. 366.

[2] *Dig.* 1, 1, 1, § 2.

the backbone of the Fiction Theory, which defines the juristic person as a *persona ficta*, is really the famous Concession Theory, according to which the juristic person is a concession or creation of the state. This explains much. It explains Savigny's statement that for private law juristic persons are merely subjects with a property capacity, and *every other side of their character lies completely outside its limits*.[1] Furthermore, it explains Saleilles' statement that the Fiction Theory is a theory of public law disguised under the concepts of private law.[2] It therefore explains why the Fiction Theory implies a conception of public law and, indeed, of law itself, which is not that contained in Ulpian's account of the Roman law.

Once it is admitted that the juristic person of an association obtains its legal status, not from its nature as a social fact, but from a legislative act of the state, it is no longer possible to maintain Ulpian's classification of the law into public law and private law according as it considers the interest of the state or that of the individual. It becomes truer to define law as the command of a sovereign, rather than as the protector of interests. The right of association is made to be something which the state can concede or deny as it thinks fit. The courts will merely have to carry out its decrees. They cannot dispute them. They cannot bind the state to any definite course of action in the matter of its concessions. These concessions, as Savigny clearly asserts, may be made either by means of a legally established rule or by a political act, that is, in a particular case apart from any permanent rule.[3] No doubt, if it were attempted to dissolve an association under a certain legally established rule which did not apply to that association, the courts would be legally right in refusing to allow its dissolution. But all that would then be required would be a political act into the validity of which the courts would have no right to inquire. Its validity would rest upon the fact that it is a command of the sovereign authority, the state or ruler. But what guarantee have

[1] *Ibid.*, § 85.

[2] Cf. R. Sohm, *Instituten des Römischen Rechts* (14th ed., 1911), p. 229, 'Das römische Recht kennt grundsätzlich nur juristische Personen des öffentlichen Rechts'.

[3] *Ibid.*, § 89. On the question of how far it was necessary in Roman law to pass a *lex specialis* for each association, *vide* also Saleilles, *ibid.*, p. 65 ff. He maintains that different kinds of associations were authorized *en bloc*, as under the *système de l'autorisation préalable* of French law prior to the Law of 1901 (1st July).

we that the concessions of the state will be justly granted or denied? This is where the jurisprudence of the Fiction Theory exhausts itself. Its answer must necessarily withdraw from the province of law into that of politics. Legally the right of the sovereign state to grant or deny legal status to an association is absolute. The Courts, which apply the law, must accept the verdicts of the sovereign without dispute as legally valid, however bad they may be from any other point of view. If there is no adequate legal guarantee that justice will be done, this is the nature of the case. The legal sovereign is in its nature unlimited. Dangerous this may be from a political and social point of view, but then the remedy obviously lies in judicious political and social organization. In short, the Fiction Theory is reduced to making political considerations the ultimate guarantee that the law shall be just and the rights of men to associate properly respected. This is what we find in Savigny's system. True, he maintains that 'the necessity of state-sanction for the creation of every juristic person has, independently of all political considerations, a perfect juristic basis.'[1] For, if the authority to confirm the jural capacity of an ideal subject were allowed to be exercised by the volition of private will, 'the greatest uncertainty of jural conditions would unquestionably result, quite irrespective of the great abuse which would be rendered possible by a dishonest exercise of such a will'.[2] We have here really two distinct arguments, and they should not be confused, for the one contains a profound truth, the other a pathetic fallacy. The need for certainty in jural relations, the requirement of a single system of law whose relations do not contradict one another—these are certainly juristic considerations, and any structure which satisfies their demands can be defined as juristic. They arise out of the practical problem of government, which is an important problem of jurisprudence. But as we shall presently show, the solution of the problem is not simply a question of the formal unity which is produced by putting all legislative power into the hands of a single authority. The other argument put forward by Savigny, that placing all power in the hands of the state prevents the dishonest exercise of private wills, is an argument which makes little appeal to-day. Savigny wanted an absolute sovereign at the head of Germany. His mind was full of the contrast between a benevolent autocracy and the chaos of squabbling principalities. But to-day

[1] *Ibid.*, § 89. [2] *Ibid.*, § 89.

the sovereign state is as much an object of distrust as the autocratic ruler. That Savigny knew perfectly well that this second argument was hardly a juristic one is shown by the statement he makes immediately after it: 'to this purely juristic ground must, however, be added certain political and politico-economical grounds.'[1] For him the absolute sovereign was a desirable political fact. For us it is an object of fear. At any rate, the question is a political one and not a juristic one. Jurisprudence is not concerned with the question who should exercise authority, but with the question of the nature of that authority. If Savigny's system is offered as a system of jurisprudence, the jurist can immediately ask the burning question, 'quis custodiet custodes ipsos?'—and its whole account of the state falls to the ground. That Savigny did not entertain this question is proved by the fact that he did not introduce the conception of juristic personality into the realm of public law. Naturally, it seemed to him superfluous there, for he was, like his school, desirous of attributing sovereignty to the ruler and not to the state as a personified abstraction. Consequently, he was content to separate the property of the state from that of the prince, to which end he preserved the notion of the *fiscus*—a notion of private law, not of public law. But to the sovereign power behind the public law he carefully avoided attributing juristic personality, for this power was to his mind essentially extra- or supra-legal. In short, Savigny's jurisprudence rests upon political and not juristic foundations.

Now, it is the aim of jurisprudence to understand the nature of law as a system of rules for the orderly regulation of social conduct. Its exact scope, as we have said[2], is not easy to determine, for the object of its study is one which many other sciences share with it. It is particularly difficult to keep apart the final issues of jurisprudence and political philosophy. Prima facie, their respective provinces seem quite distinct. But when we go deeper into the sanctions of law and the nature of political obligation, the dividing line between jurisprudence and political philosophy tends easily to fade away, and the writings of both jurists and political philosophers are frequently full of a confusion of the two. But it is submitted, on the one hand, as a fundamental idea of this work that, though jurisprudence and political philosophy are closely allied in that they both deal with the same subject-matter, their

[1] *Ibid.*, § 89.

[2] *Vide supra*, Introduction, p. lxii.

respective interests in it are nevertheless distinct, and it is of the gravest importance for the proper appreciation of law that our juristic thought should remain free from the irrelevant solutions of purely political problems. It is, however, further submitted as of equally vital importance that, while the jurist has no immediate interest in the problems of the political philosopher, he nevertheless cannot disregard the fact of political power as a necessary element in his definition of law. The meaning of these two statements will, it is hoped, become increasingly clearer in the course of this treatise. The criticism of the Fiction Theory and its implications, which follows, is essentially the criticism of a false view of the relations between law and politics.

The Fiction Theory stands as the legal *raison d'être* of corporate persons. The *actual* reason why the law does recognize them, or, more accurately, why the law-giver recognizes them, is the fact that men do associate to form a group of which they consider themselves members, and which somehow functions as a composite whole. This no one will deny. But the Fiction Theory denies that this reason is any more than a political one. It has no meaning for jurisprudence, which concentrates on the *juristic person* of the corporate body. Jurisprudence is interested in the corporate body *qud* juristic person, that is, only in so far as it is legally recognized; and its problem is then: what makes it a juristic person? The answer, which goes as far as the juristic thought of the Fiction Theory can go, is: the fact that the state recognizes it, or, better, concedes it a juristic personality. This answer shows that the Fiction Theory misunderstands the role which the legislator really plays in the guidance of social relations. It implies a definition of law which excludes as irrelevant any reference to the nature of society as a living world of human effort. Law is made to depend for its validity in no way upon the nature of its content but simply upon its form, upon the fact that it is the command of a sovereign. The widest possible gulf is created between the life of society and the character of law. Instead of shaping itself in accordance with a criterion which takes account of society as a living reality, law must base its validity upon the fact that some sovereign authority has decreed it. It is political absolutism, juristically interpreted.

The objection which immediately suggests itself is similar to that which is usually made against political despotism. The apostle of political freedom revolts against the idea of political

power being vested in one or a few persons enjoying unlimited authority. He asks for guarantees that this power will be properly used, and his solution usually lies in the direction of giving the governed some say, however indirect, in the matter of governing. The jurist, however, cannot be content with such a solution, and it is here that the difference of his problem from that of the political philosopher becomes apparent. It is not the concern of the jurist whether political power is vested in a single despot or in a democratically elected, representative assembly. Such a distinction affects political issues only. For the jurist they are, so to speak, distinctions without a difference. But if it is not his business to pass judgement upon the different modes of political organization, it may yet be necessary for him to take account of the fact of political organization as a necessary element in the complete definition of law. In other words, it may be that the ultimate sanctions of law are in the nature of extra-legal sanctions—sanctions with a character other than legal. This is, however, strongly denied by adherents of the Fiction Theory and the theory of sovereignty which it implies. They have, indeed, made much capital out of the difference between the issues of politics and the issues of law, between the character of the *de facto* or political sovereign and the *de jure* or legal sovereign. This view will appear in a more familiar light if we leave Savigny and consider it as presented in the work of Dicey, whose theories find widespread favour among lawyers and jurists in England and America.

The connexion between the Fiction Theory and Dicey's theory of legal sovereignty is not perhaps immediately evident, but a closer analysis shows that if their respective origins are somewhat different, their inherent characters as juristic theories are in all essentials the same. The Romanist Fiction Theory was, as we have seen, the logical outcome of an individualistic view of society. The same could hardly be said of Dicey's theory of legal sovereignty. The statement implies a relation between juristic theory and social theory. But this is a relation which has no place in Dicey's thought. For him the province of jurisprudence is exclusive and self-contained. If the problem is juristic, its solution must also be so, and thus the ultimate foundations of law must be sought within the province of purely legal judgement.[1] Jurisprudence is, therefore,

[1] This classes Austinian jurisprudence with Neo-Kantian jurisprudence as rationalistic. *Vide infra*, part i, ch. ii.

an exclusive science and carries within it the criterion of those values with which it is concerned. Such a view alone explains the remarkable isolation in which Dicey treats the problems of jurisprudence and the absolute separation of this from the other social sciences, on which he insists so strongly in his *Law of the Constitution*.[1]

Dicey objects to the common criticism of the Austinian jurisprudence generally, and of the Austinian theory of sovereignty in particular—namely, that they are too formal, that they have all the defects of an *a priori* and abstract point of view. Their critics, the historical jurists, never cease to emphasize that they proceed *a priori* from a principle which is arbitrarily accepted and indeed historically untenable. But, says Dicey, so far from its being true that the sovereignty of Parliament is a deduction from abstract theories of jurisprudence, a critic would come nearer the truth who asserted that Austin's theory of sovereignty is suggested by the position of the English Parliament, just as Austin's analysis of the term 'law' is at bottom an analysis of typical law, namely, an English criminal statute.[2] In other words, they are 'generalizations drawn in the main from English law'.[3] But they are generalizations which, thinks Dicey, give us true conceptions of sovereignty and law from the legal point of view. This follows from his refusal to admit that any of the *actual* limitations on the exercise of the legal sovereign's powers impair its legal character as a law-maker 'unrestricted by any legal limits'.[4] But to appreciate this view it is necessary to understand his distinction between and separation of 'political fact' and 'legal fact'.

Sovereignty is, for Dicey, 'a merely legal conception, and means simply the power of law-making unrestricted by any legal limits'.[5] In this sense the sovereign under the English constitution is Parliament, and so the sovereignty of Parliament is rightly termed a legal fact. Yet, though Parliament is then legally entitled to pass any legislation it likes, actually it does not and cannot do so, because it is only within certain limits that it can count on the ultimate obedience of its subjects to its will. Thus, as Dicey admits, under the English constitution the electorate, and under

This applies only to his work on constitutional law and jurisprudence. It is quite a different view of legal problems from that which he takes in his historical work. *Vide infra*.

[1] Dicey, *Law of the Constitution* (8th ed.), p. 70.
[3] *Ibid.*, p. 69. [4] *Ibid.*, p. 70. [5] *Ibid.*, p. 70.

any constitution the governed, ultimately possess sovereign power.[1] But this sovereign power he calls the 'political sovereign', and its existence a 'political fact'.

Legally it has no significance, and the proof of this is that the Courts which administer the law will take no notice of the 'will of the people' except in so far as that will is expressed by an Act of Parliament,[2] the legal sovereign. Dicey therefore goes further than Austin and excludes the electorate from his definition of the legal sovereign under the English constitution. He thinks that Austin has apparently confused the political sovereign with the legal sovereign.[3]

It is difficult in the light of this view to understand what Dicey means by the statement that 'the two significations (of the word sovereignty), though intimately connected together, are essentially different'.[4] What this intimate connexion is we are not told. The entire emphasis is laid on their essential difference, a difference which renders the meaning of the one quite irrelevant to that of the other.[5] It is not primarily our purpose here to discuss this view of legal sovereignty as an adequate interpretation of that underlying the English constitution. We are concerned with it as an adequate interpretation of the nature of legal sovereignty considered from the standpoint of a critical and constructive jurisprudence, and as such, it is submitted, it cannot satisfy the demands of law in its profoundest sense as a system of rules for the orderly regulation of social conduct.

Dicey's theory of legal sovereignty gives us the clearest possible statement of that absolutism which, we have seen, forms the foundation of the Fiction Theory. What the legal sovereign com-

[1] *Ibid.*, pp. 70–1 and pp. 74–7. Dicey also admits an 'internal limitation' upon the sovereignty of Parliament in so far as its members are all products of a certain environment and are thus psychologically incapable of passing certain legislation. *Vide*, pp. 77–9. But like the limitation effected by the 'political sovereign', it is non-legal in character and does not affect the unrestricted legal power of Parliament.

[2] *Ibid.*, pp. 68–9 and p. 72.

[3] *Ibid.*, p. 72. Cf. Austin, *Jurisprudence* (4th ed.) i, pp. 251–5.

[4] *Ibid.*, p. 72.

[5] This is the foundation of the curious contrast between Dicey's work on constitutional law and jurisprudence on the one hand, and on the history of legal institutions on the other. In the former he works on the hypothesis that the two significations of the word sovereignty are 'essentially different'. In the latter (cf. *Law and Public Opinion in England during the Nineteenth Century*) he works upon the hypothesis that they are 'intimately connected together'.

mands is law. So far as its subjects are concerned—'Legis habet vigorem quod principi placuit'. Thus the legal sovereign exists for the purpose of making laws which will assure the rule of justice within the life of society, but it is by definition incapable of being itself subjected to any legal limits. The problem, 'quis custodiet custodes ipsos?' remains unanswered where an answer is most needed to safeguard the interests of justice.

For Dicey, then, the existence of *actual* limitations upon the exercise of the legal sovereign's powers is in no way inconsistent with its *legal* omnipotence. He does not hesitate to speak of Parliament under the English constitution as legally unrestricted, though actually or politically restricted, in its powers of legislation. The apparent contradiction, we are told, disappears if we remember that the former is a legal fact, whereas the latter is a political fact, two mutually irrelevant things. This is, indeed, the crux of the matter. The truth is that Dicey maintains, and can maintain, his 'legal sovereign' only by an absolute separation of the two 'essentially different' provinces of political fact and legal fact. Their intimate connexion, of which he also speaks, is inconsistent with the idea of an absolute legal sovereign. In so far as it is maintained it serves but to pay tribute to the actual power of the political sovereign and to prove the omnipotence of the legal sovereign an empty boast. To illustrate this we need not go outside the pages of Dicey's *Law of the Constitution*.[1] But if its acceptance does away with any intimate connexion between the respective provinces of political fact and legal fact, it does not impair Dicey's theory of legal sovereignty, which is based upon their essential difference. He readily admits that the unrestricted power of the legal sovereign is not and cannot be put into practice, but he will not allow that this in any way affects the definition of that sovereign as legally unrestricted. A legal right is no less a legal right because it cannot be enforced. This, of course, follows logically from the separation of political fact and legal fact. The problem raised is a profound one, and will have to be discussed more than once in the course of this treatise. Our immediate concern is, however, to consider the validity of the premisses from which this view of the nature of legal rights is a deduction. It is Dicey's absolute separation of political fact from legal fact which constitutes the most important object for criticism in his work.

[1] *Vide ibid.*, pp. 69 ff. and pp. 425–6.

On what grounds does Dicey make this separation? His own answer is found in the following statement: 'The judges (in England) know nothing about the will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors.'[1] Prima facie this seems to support the thorough separation of the legal sovereign from the political sovereign, at any rate so far as English constitutional law is concerned; but a more thorough analysis shows that it is really a criticism of that separation. The judges, it is true, know nothing about the will of the people except in so far as that will is expressed by an Act of Parliament, but they will and can recognize that Act only as the Act of a duly elected representative assembly.[2] Thus the idea of a mandate, by which the political sovereign (the subjects) grants the legal sovereign (the ruler) its sanction, the power of enforcing its commands, cannot be neglected in the definition of the legal sovereign. Though the idea of this mandate may remain merely tacitly implied in the general course of legal practice, there is little doubt that, should the necessity of bringing it to explicit recognition arise, the Courts would demand that the House of Commons, as a constituent part of the legal sovereign, should have been duly elected or, in other words, properly invested with the mandate of the people.

But to consider the problem on a wider scale. The absolute separation of political fact and legal fact, so far as the definition of the latter is concerned, renders impossible any answer to the final problem of jurisprudence. Science seeks to introduce order into the world of our experience so far as our knowledge of it can go. Its weapon is logic, which drives us to seek a criterion by which we may distinguish the merely arbitrary and false from the logically necessary and true. Jurisprudence, in so far as its standpoint is scientific, seeks a rationale by which it may distinguish the true from the merely arbitrary within the realm of law. But Dicey's position renders the satisfaction of this aim impossible. For,

[1] *Ibid.*, p. 72.

[2] This statement is, of course, subject to the qualification that of the three constituent elements of Parliament, the King, the House of Lords, and the House of Commons, the last is alone an elected assembly. But since it is an essential, if not the most important part of Parliament, this does not affect our present argument.

having separated the province of political fact from that of legal fact, and made the latter an independent world of value, he is compelled to define law, the inherent character of legal facts, purely in respect of its form. He must, so to speak, define law in terms of itself. Hence law becomes, in Austin's words, 'the command of a sovereign', and that sovereign is 'a merely legal conception, and means simply the power of law-making unrestricted by any legal limit'.[1] That the power of this sovereign is unrestricted follows from its being the highest grade in the hierarchy of legal powers, and since we have been forbidden any departure outside the realm of purely legal considerations we must rest content with it as the ultimate criterion for determining the validity of the law. But have we in any sense satisfied the aim of jurisprudence if our ultimate criterion is in its nature unlimited and invested with arbitrary powers? Have we not failed to distinguish between the subjective conviction of a legislator and that objective validity which the very conception of law implies? We have put the cause of justice into the hands of a sovereign, be it a parliament or a despotic prince, and let its definition be found in the expression of that sovereign's will. Thus the theory of legal sovereignty, which Dicey submits both as an accurate interpretation of the theory underlying the English Constitution and as sound from the general standpoint of jurisprudence, fails to satisfy the two main demands of juristic theory.

Firstly, it fails to explain why the law of any society should be the law of that society. This is not merely a problem of political obligation outside of the scope of jurisprudence. It is a problem the answer to which must have an important practical effect on the working of any legal system. It is, indeed, the problem of knowing what constitutes a legal society. In other words, it is the very problem which we are considering when dealing with the juristic

[1] Dicey, *ibid.*, p. 70. Dicey does not, so far as I am aware, expressly use Austin's definition of law. But it is a definition implied throughout his theory of the constitution. The nearest approach to a definition of law in his writings is on page 23 of his *Law of the Constitution*, where he speaks of 'laws in the strictest sense' as 'rules which, written or unwritten (whether enacted by statute or derived from the mass of custom, tradition or judge-made maxims known as the Common Law), are enforced by the Courts'. But these sources are merely aspects of the legal sovereign. They are all subordinate to that which finds its expression in statute, for Parliament can by statute override any of the rules derived from custom, tradition or judge-made maxims. *Vide* Dicey, *ibid.*, p. 38, and Introduction, pp. xviii ff. Hence this definition is really a definition of law in terms of the command of a sovereign. It is a definition of law purely in respect of its source.

doctrine of corporate personality. The only solution, if any, which Dicey's theory can offer is that which we considered under the title of the 'Fiction Theory'. Dicey's legal sovereign, in its unrestricted power of law-making, can or need not recognize an association. The criterion of its action in this respect resides within it and is purely arbitrary, as must be the character of any sovereign will 'unrestricted by any legal limits'. Further, Dicey's theory makes it impossible to define the limits of the legal sovereign's jurisdiction, for the fact of consent or the mandate of the governed does not enter into the definition of it. Legally, therefore, there is not only the absence of any limit to what the legal sovereign may command, but also of any limit to those whom it may enjoin to obey its commands. This all follows from Dicey's refusal to take account of those extra-legal political sanctions which, it is submitted, cannot be excluded from an adequate definition of law.

Secondly, Dicey's theory fails to do justice to that demand which jurisprudence makes in its character as a normative science. The aim of law is not merely to express the transitory wishes of the people. Such a law would merely result in the chaos of mob-rule. The aim of law is also the service of an ideal, the introduction of justice into the life of society. It must therefore be charged with a sound conception of that ideal which must ever be present in its rules. This element of an extra-legal social ideal must therefore be included in any adequate definition of law. But Dicey's theory can give it no place, for there law is the command of the legal sovereign, and the latter is not legally subjected to the recognition and pursuit of any social ideal.

But if the Austinian jurisprudence in general and Dicey's theory in particular are too one-sided to deal adequately with juristic problems, they nevertheless contain an important truth which we dare not neglect. It comes out very clearly in Dicey's treatment of those corporate bodies which come within the jurisdiction of the legal sovereign. He calls them 'non-sovereign law-making bodies', and thinks they are characterized by distinct 'marks or notes of legislative subordination'.[1] We need not discuss the theory of corporations here implied. It is, as we have seen, merely a variation upon the theme of the Fiction Theory. But it is instructive to note how he arrives at this theory, for it shows precisely what is the real driving force of all his juristic thought. It brings out the

[1] *Ibid.*, pp. 87–8.

great truth which the Austinians have hold of, a truth too often obscured by the exclusive and inordinate emphasis they put upon it.

Dicey, discussing the nature of non-sovereign law-making bodies, writes: 'From the attributes of a sovereign legislature it is possible to infer negatively what are the characteristics all (or some) of which are the marks of a non-sovereign law-making body, and which therefore may be called the marks or notes of legislative subordination.'[1] This statement shows how Dicey's thought proceeds. He begins with a legal sovereign unrestricted by any legal limit, a sovereign which contains as inherent in it all legal power. Consequently any other corporate body which enjoys certain legislative power, e.g. a church or a railway company, must exist by virtue of a concession on the part of the legal sovereign. It must be an offshoot of the legal sovereign and necessarily subordinate to it. This is what Dicey means by inferring negatively the characteristics of non-sovereign law-making bodies. The process of his argument is significant, for it marks the character of Dicey's, like all Austinian, thought as essentially unitarian compared to that of Duguit and his school, which is, as we shall see, essentially pluralistic. It shows what constitutes for the Austinians the fundamental problem of jurisprudence. It is the practical problem of government. From the Austinian point of view the essence of law is that it is the command of a sovereign, that it implies the relation of a ruler to his subjects.[2] This relation is considered indispensable to establish that unity which it is the purpose of law to bring into the life of society. Thus Dicey is well aware of the fact that the legal sovereign, e.g., Parliament in England, does not really create those non-sovereign law-making bodies. He knows that their origin as social and economic organizations lies in the initiative of their members. But for him the vital juristic problem is how those bodies may be brought within one great juridical organization,

[1] *Ibid.*, pp. 87–8.

[2] Cf. Austin, *Province of Jurisprudence Determined* (3rd ed.), section vi, p. 226: 'If a *determinate* human superior, *not* in a habit of obedience to a like superior, receive *habitual* obedience from the *bulk* of a given society, that determinate superior is sovereign in that society, and that society (including the superior) is a society political and independent'. Austin here goes further than Dicey. He connects political sovereignty with legal sovereignty by the element of 'habitual obedience'. This Dicey does not and cannot do. This does not, however, mean that Austin in any way deviated from his definition of law as the command of a sovereign. His point of view remained formal.

and this he thinks possible only if there be some supreme legislative authority of whom they hold their powers. In other words, his solution is feudalism divested of its contractual basis.

Now if Dicey's viewpoint is too one-sided, it does appreciate at least that one side of juristic problems which the pluralists such as Duguit neglect. We cannot do more at present than state it. Its discussion must be left till later. Briefly it is this. Society consists not only of individuals but also of groups of such individuals each of which functions externally in a unitary capacity similar to that of the individual. These groups must be co-ordinated in order that they may work together and constitute a juridically organized society. They cannot be left entirely to themselves, as syndicalism would have it. They must have properly defined spheres of action and keep to them. Churches, universities, railway companies and the like must not legislate for matters which do not pertain strictly to their respective, carefully defined purposes. Somehow, and this is the crucial point, they must all be brought within the comprehensive jurisdiction of some supreme authority, and it is clear that this authority will differ from those subordinate authorities over which its jurisdiction in some sense extends. This difference is stated in the strongest terms by Dicey; and if his account cannot stand as an adequate interpretation of the relations between the state and corporate bodies within it, it has at least the merit of recognizing to the full the importance of that difference. The weakness of Dicey's theory—and it is the weakness of the Fiction Theory—is that it sacrifices one term in the relation to the other. In trying to account for the jurisdiction of the legal sovereign over the non-sovereign law-making bodies, it begins with the former and by a process of negative inference deduces the latter as mere offshoots of it. The strength of Dicey's theory lies in that it emphasizes the need for such a co-ordinating factor as is implied in the very conception of sovereignty.

This conception is a wide one if divested of those attributes given to it by special theories of sovereignty, and especially the Austinian. Thus it is possible to speak of the sovereignty of the law,[1] state sovereignty[2] and royal sovereignty. All that the conception of sovereignty implies is the relation between a superior

[1] Stammler and Kelsen both speak of 'Rechtssouveränität'. *Vide infra*, part i, ch. ii and iii.

[2] Jellinek speaks of 'Staatssouveränität'. *Vide infra*, part iii, ch. iii.

authority and those who owe it obedience. It is not in its pure form necessarily bound up with any 'metaphysical conception of subjective right', 'the power of one will to impose itself as such on other wills'.[1] All that it implies is the peculiar character of law in respect of which it differs from morality. The latter says you *ought* to do this and not that. The former says you *must* do this and not that. This does not mean that force is a necessary element in the definition of law. It does, however, mean that within certain limits the use of force is justified in carrying out the law. This imperative character of law is, as we shall see, not an accident. It may be a purely formal attribute, but it is none the less essential. And it is just this that the conception of sovereignty appreciates in the relation it implies between a superior authority and those who owe it obedience. It is the merit of Dicey's theory that it recognizes the presence and importance of this relation wherever there is juridical organization, not merely between the members of a corporate body but also between different corporate bodies. In other words, Dicey realizes the need of something more than mere jural relations, that we cannot have law without a state,[2] and that this state is itself something more than a mere jural relation.[3]

Dicey, like Austin, of course goes further and identifies the sovereign with certain persons. But this is a special development of the pure conception of sovereignty and is not essential to it. The pure conception does not tell us where the sovereign is to be found, what is its content. All that it signifies is a relation of subordination which cannot be excluded from the domain of juristic construction. Law is not merely descriptive but also constructive. Hence its imperative character. It goes beyond the actual condition of social intercourse and seeks to guide that intercourse into a new mould. So far its efforts must take on an imperative character. But if unity and order are to be brought into the life of society we cannot have many and conflicting systems of law. We can have only one system of law (*droit*), comprehending and co-ordinating diverse rules of law (*lois*). Accordingly, it is not enough that different corporate bodies, such as municipalities, trade-unions, railway companies and the like, should be left entirely to themselves, each to lead the isolated existence of an independent, juridical organiza-

[1] Duguit, *Droit Constitutionnel* (2nd ed.), vol. i, p. 3. *Vide infra*, part ii, ch. i.

[2] Cf. Vinogradoff, *Historical Jurisprudence*, vol. i, p. 82.

[3] Duguit tries to explain the state as a jural relation. This theory is discussed in part ii, ch. i.

tion. So long as these bodies do interact socially and economically in such a way as to constitute one great social and economic group essential to the existence of each one of them, so long must there be some superior co-ordinating legal authority. This is precisely what the Austinian jurisprudence appreciates so fully. Its standpoint may be termed ultramonistic, in contrast to that of Duguit and his school, which is ultrapluralistic. The former sacrifices everything in order to achieve a co-ordinating factor of unassailable strength. The latter sacrifices that factor in order to respect and preserve juridically the individuality of smaller groups.

To put this in a different and, for our present purpose, more instructive way, the Austinian viewpoint is essentially hierarchical. Duguit is fundamentally opposed to it, and discards altogether the conception of hierarchical subordination. But it is submitted that if the Austinians have failed to show on what grounds this hierarchical subordination is to be established, they have at least realized that the social unity and order, which is the ideal of a juridically organized society, can be achieved only if there be some superior, co-ordinating authority. Who should be the bearer of this authority, whether it should be a prince or a democratically elected assembly,[1] is a question for political science, with which the jurist is not concerned. But the idea of a superior authority implied in the pure conception of sovereignty is indispensable to the jurist. In order that a special group may function juridically in relation both to its own members and to other social groups, it is essential that it should produce some organ duly authorized to act on behalf of the group. This statement implies all that we have said above and much that we shall say in later chapters. If society functions as a whole by virtue of a social solidarity resulting from the interaction of its individual members, such interaction left to itself cannot suffice to produce a juridically organized society in its fullest sense. It produces such a society only if it evolves some definite authority, such as Professor Lindsay calls 'an agreed method of settling differences'.[2] This means that law requires something more than a mere group of individuals interacting socially because of some common interest. The group must be organized, and its organization will be, from one point of view,

[1] According to Krabbe, democratic representation is the *sine qua non* of any true legal organization from the juristic point of view. This theory is discussed in part iii, ch. iii.

[2] Lindsay, *Sovereignty*, Aristotelian Proceedings, 1924.

hierarchical. This does not mean, as Duguit thinks it must, that one will is by inherent right capable of imposing itself on other wills. It means simply that the group has organized itself in such a way that those who act on its behalf can be considered to be doing what is within their power in so far as their actions will, in the legal sense, be honoured by the group as a whole. Thus, if from a social point of view society is constituted by the interaction of individuals pursuing common or complementary interests, from the juristic point of view the important thing is that its social solidarity translates itself into an organization in which there appears a definite authority having within certain limits the right to act on behalf of the group. This appears not only in the case of individuals forming a corporate body but also in the case of various corporate bodies cohering within a larger organization such as the state.

The recognition of this important juristic truth forms the armour of Austinian theory. Law seeks to bring a unity into the world of social differences, an order into the world of social conduct. This aim the Austinians never neglect, and it is the great merit of their theory that it appreciates the necessity of having, for its achievement, a superior authority enjoying the right to act on behalf of the group and to require its obedience. Their great error, the results of which must not be underestimated, lies in their sacrifice of those differences which it is the aim of juridical organization to bring into unity. In answer to the question, how can different groups be juridically made to constitute one? The Austinians, like Savigny, reply, by considering these different groups as emanations of the one. We have criticized and may discard this answer as a solution of the problem. But we should take care not to overlook the great truth contained in it, namely, that law seeks unity, and this cannot be achieved without a certain concentration of authority. And if it is true that corporate bodies within a state are born and continue to function socially apart from any effort on the part of the state, yet it is not enough for juristic purposes to leave them at that. If they are all to function as parts of one great organization, there must be some sovereign authority with the right to determine certain matters regarding their mutual relations and their respective interests so far as these affect the general order of the entire organization. Just how far this jurisdiction should extend is to-day the subject of acute discussion among both political philosophers

and jurists. It is, of course, the essential problem for any theory of corporate personality.

The conclusions reached in this chapter have been very general and mainly negative, for they have been in the main a criticism of the Fiction Theory and its implications. We have shown how this theory proves both inadequate and dangerous in the realm of private as well as public or constitutional law. It implies as inadequate an account of the state as it purports to give of those corporate bodies which are co-ordinated in a state organization. There are indeed few jurists who are still prepared to uphold it. But it is still very important and the natural starting-point of any work whose problems are bound up with the juristic conception of corporate personality. And this is so for three reasons. Firstly, it is still the theory used in the legal practice of most countries. If the jurist has already laid its ghost, the lawyer still knows it in the flesh. Secondly, it is historically important, for no theory of corporate personality has escaped its influence one way or another. And thirdly, the criticism of it is a valuable introduction to the study of the problem it seeks to solve. For if our criticism of it has resulted in discarding it as an account of the juristic nature of corporate bodies, it has brought out more or less explicitly certain considerations of fundamental importance to a study of the problem.

In the first place, we have seen that on the one hand the sanctions of law are extra-legal or social and that on the other hand every legal judgement has a moral judgement as its background. An adequate definition of law will take account of these two elements, and such a definition alone can guide us truly in the appreciation of juristic problems. Thus, in studying the juristic nature of corporate bodies, we must look for their sanctions in the extra-legal province of social organization and examine the character of their purposes in the light of a social ideal.

Secondly, law is imperative in character, and this is no mere accident. It is a unifying and systematizing force and requires the existence of an ultimate authority or explicator in order that it may be one. There must be finality of decision as to what the law is, and this cannot be achieved without the hierarchical relation of sovereign and subject. It is the great merit of the Austinian theory that it appreciates this so fully, though it overstates it and sacrifices everything else to it.

Lastly—and this is the central point of this work—it follows

that if we preserve a complete interest in the juristic nature of corporate bodies, we cannot separate the problem from the problem of sovereignty. In studying the juristic nature of corporate bodies we cannot treat them in isolation and merely in respect of their internal structure. We cannot divorce this aspect of them from the correlative aspect of them as bodies with external relations to one another. The corporate entity of the state cannot be separated from the corporate entities of private associations. Thus, if by corporate personality we mean the legal subjectivity of a corporate body, and by sovereignty the character of an authority which functions as supreme arbiter of juristic relations, those between corporate bodies as well as those between individuals, then we may say that the problem of corporate personality is bound up with the problem of sovereignty and cannot be studied apart from it. In short, the question of juristic personality has an essential bearing on the relation between law and state.

II

NEO-KANTIAN JURISPRUDENCE: RUDOLF STAMMLER

Rationalistic theories — rationalism — critical method of Kant — neo-Kantian jurisprudence — Stammler and Kelsen — Stammler's theory of law — his view of jurisprudence — his theory of the state — his account of the content of law — his theory of associations — his view of relation between law and state — his theory of sovereignty — Stammler's method — similarity between theories of Stammler and Austin — Stammler's formalism — he cannot avoid Concession Theory — inconsistency in his definition of the state — Stammler's debt to Kant — he accepts Kant's view of freedom — objection to Kantian moral theory — same objection lies against Kantian jurisprudence — Kantian demand for finality in jurisprudence — Kantian dualism of the form and matter of law — abstractness of Stammler's thought — consequent error of his theory of associations — criticism of Stammler's method — logic, law, and society — Stammler's inconsistency — Kelsen's criticism.

UNLIKE the Fiction Theory and the Austinian Theory of Sovereignty, the theories which we now propose to examine have no immediate connexion with any social or political movement. Far from being 'historical' theories, they pride themselves on their freedom from the transitory and unstable processes of history. It is their avowed foundation in the unchanging principles of pure thought that gives them their peculiar character as juristic theories. Yet, though they stand and can be studied apart from any particular social or political movement, they nevertheless presuppose an historical development of thought in the light of which alone they can be understood.

Rationalism stands for more than a specialized dogma. It denotes rather a general attitude of mind, a way of approaching the problems of life. It is a point of view which, in the seventeenth and eighteenth centuries, found its way into every department of human thought. But even when it had done so, it did not produce unvarying results. It appeared as a method of thought, a kind of logical tuning-fork, in the use of widely divergent thinkers. Thus the jurisprudence of Kant shares the name of 'rationalist' with the far-removed theories of Bentham and his successor Austin. In the last chapter we saw that for Austin, and in particular for Dicey, the province of jurisprudence was exclusive and self-determined,[1] that

[1] *Vide supra*, p. 15.

it contained within it the criterion of those values which it studied and did not have to seek it in any extra-legal interpretation of social life. This view, that the fundamental principles of jurisprudence are inherent in, and can be extracted by a simple process of ratiocination from, the dialectic of legal thought is common both to the Benthamite and to the Kantian, and is the peculiar mark of rationalistic jurisprudence.[1] But further than this Kant had nothing in common with Bentham. He applied his own method of discovering the fundamental principles of juristic thought, and it will be necessary to consider carefully its peculiar character and technique before examining its results when applied to the problems of this work.

Impressed by the contrast between the stable development of the mathematical and natural sciences and the chaotic flux of the speculative and philosophical sciences, Kant sought an explanation of it. His diagnosis was that the philosophical sciences were dogmatic, that they did not take into account the presuppositions of their thought. This unscientific procedure he sought to remedy by the application of his 'critical method'. It is this—his own peculiar method for the discovery of juristic principles—that constitutes the distinguishing feature of those theories which we are about to discuss, and which may therefore be properly called neo-Kantian.

Stripped of its dignified terminology and pedantic formulae neo-Kantian jurisprudence is reminiscent of that simple faith of the philosopher in the Middle Ages that there was a first principle or *a priori* philosophy which could explain every detail in the universe, a truth-machine such as Bacon's analytic logic, but perhaps a little more miraculous. The Kantian method does not upset that faith. It justifies it by supplying the means of turning it into knowledge. It does not deny—it strongly affirms—that there is a first principle, or better, a system of first principles, guided by which we can never go astray in our juristic speculation. But if the key to truth is in itself simple, it is not easy to find. To do so requires a great and subtle effort of the mind. The world of sensible experience is transitory. It presents only an unending sequence of passing events, a world without finality. So long as

[1] Cf. Vinogradoff, *Historical Jurisprudence*, vol. i, p. 153. Vinogradoff points out that Austin had not the same right to attempt the construction of a rationalistic jurisprudence, for he renounced the conception of a law of nature and put his faith in positive law.

our minds are immersed in the observation of its changing phenomena, we cannot hope to grasp any truth of permanent validity. We cannot hope to grasp the fundamental principles of juristic thought so long as our minds are fixed on the history of legal experience. Not in the judgement of this or that legal phenomenon shall we discover the criterion of juristic values, but by asking ourselves what is implied in and common to our judgements of this, that and every other legal phenomenon. And with the help of the critical method this can be done. What universal principles do we presuppose in our thought about legal phenomena? That is the first problem of neo-Kantian jurisprudence, and its solution lies in the analysis of the legal judgement into its form and its matter, the former being the complex of universally valid principles presupposed in any legal judgement, and the latter the changing world of social experience which those principles construe legally. In other words, we must abstract from the relative and conditioned world of social experience and retire into the world of pure thought, that world in which the mind—the mind of the jurist—knows itself as a system of unconditioned, objectively valid principles, freed from its contact with those changing phenomena which are the content of its thought. We need not discuss in detail the technique of this procedure. But it is important for our present purpose to appreciate just what it implies as to the nature of juristic problems. Their solutions are to be sought, not within the world of empirical realities, but in the highest abstractions of a thought which moves analytically and sees the greatest truth or objective validity in that which is most removed from the world of sensible experience. It is obvious that such a point of view, which sees truth through the achievement of an intellectual engineering feat rather than through the comparative interpretation and adjustment of living realities, cannot fail to produce highly formal juristic theories.

So far as this point of view is concerned, there is no difference between the work of Rudolf Stammler and that of Hans Kelsen. Both proclaim themselves followers of Kant and accept his critical method of treating the problems of jurisprudence. But though they have so much in common they do not arrive at the same results. It will therefore be necessary to treat their theories separately. But before we proceed to do so, it is well to note—and this explains largely why they are both Kantian—that the writings

of both jurists are directed mainly against the theory of sovereignty which we discussed in the last chapter. Austinian jurisprudence defines law as the command of a sovereign, and it follows that the criterion of what these commands should be must reside in the arbitrary will of that sovereign. The explicator of the law is, so to speak, a law unto himself. Nor does it change the juristic character of that theory if sovereignty is made to reside in a parliament or 'state' instead of a prince. The sovereign, whoever it be, remains a *power* unlimited in respect of what it can do. Law is what it commands, and an association can have a legal existence at best by virtue of its concession. To this theory both Stammler and Kelsen are directly and fundamentally opposed. It is their common aim to establish a sure and permanent criterion of legal values just in order that we may give our legal judgements that objective validity which the very idea of law implies, and so save ourselves from the uncertain discretion of an arbitrary authority. Their writings are all first and foremost a protest against the theory that law presupposes the state, that it is the product of a political organization whose function is to *create* it. But as to what the true theory is they do not agree.

Stammler states his own theory as follows: The conception of law is the logical presupposition of the idea of the state.[1] The tables are completely turned. Law, far from presupposing any social or political organization, is itself the necessary presupposition of the state or of any organization with a juristic character. But it is important to remember that Stammler's language is that of Kant, and so charged with a special meaning. To appreciate what Stammler is driving at we must bear in mind precisely what he means by this 'logical presupposition'. He does not mean that law somehow creates the state and enjoys a temporal priority to it. He is not dealing with empirical realities existing in the world of space and time. He is merely affirming a logical relation between two intellectual abstractions, the conception of law and the idea of state. The former is a 'pure form of consciousness',[2] an organizing principle (*Ordnungsprinzip*) which is essential to the unity and order of our mental life. We must again bear in mind that his words have an unusual connotation, when Stammler says that the

[1] *Rechtsphilosophie*, par. 136, 'Da der Rechtsgedanke die logische Voraussetzung des Staatsbegriffes ist, und nicht umgekehrt . . .' *Vide* par. 39, n. 1, and par. 56 also.

[2] *Ibid.*, par. 136, 'reine Form der Bewusstseins'.

conception of law signifies a type of willing.[1] He does not mean that it is a power (*Kraft*) standing in a causal relation to social life and, so to speak, forcing it into a certain mould. He is not propounding any psychological theory of will. By the conception of law as a type of willing—that is, by the legal will—he means a direction of consciousness, a pure method of organization; in other words, a logical procedure by means of which we give unity and order to our ideal construction of society.[2]

For this construction we do not require any psychological or sociological[3] study of social life. We are concerned only with the *logical* analysis of its content, the purposes of mankind. And so the conception of law, the legal will, means the idea of the permanent union of human purposes.[4] Philosophical jurisprudence is therefore a part of the Science of Purposes (*Zweckwissenschaft*), whose work is the scientific organization of human purposes, the content of human willing.[5] But it is only a part of this science; or better, the interest of a philosophical jurisprudence in this science is limited. For it does not study the particular purposes of a particular society—that is the work of a technical jurisprudence which deals with the legal system of a particular country. It seeks to know only those 'critical' principles which are essential to the scientific organization of any and all such purposes. It is the system of these unconditioned and eternally valid principles that the idea of law implies. Only if our juristic interpretation of social life consists of a rigid application of these principles to its diverse and changing phenomena shall we realize the ideal of justice at which all positive law aims.[6] And only after we have extracted these principles, and grasped them in their pure form, shall we be able to distinguish what is unconditioned and of absolute validity in the

[1] *Ibid.*, par. 30, 'eine Art des Wollens'.

[2] *Ibid.*, par. 26 and par. 30, n. 1: 'Das Wollen in diesem Sinne ist eine reine Methode des Ordnens, nämlich das logische Verfahren.' Cf. par. 111, n. 4.

[3] Stammler means sociological studies, such as those of Comte or Simmel; *vide ibid.*, par. 35.

[4] *Ibid.*, par. 136: 'Die Vorstellung eines bleibenden Verbindens menschlicher Zwecksetzung.' I have translated 'Vorstellung' as 'idea'. In Kant, the word means, strictly speaking, 'consciousness'. But the neo-Kantians do not always, it appears, follow Kant in his use of terms, and, as we are in the province of jurisprudence and not of metaphysics, no harm can come of the use of the word 'idea' in the above context.

[5] *Ibid.*, par. 27.

[6] Stammler, *Die Lehre von dem richtigen Recht*, p. 31. *Vide*, also, *Rechtsphilosophie*, par. 2.

world of legal values from that which is relative to and conditioned by the temporary state of a particular society. To the former belongs the conception of law, with the system of principles which we derive from its logical analysis. To the latter belongs the idea of the state, which is no necessary category of scientific legal thought but merely a peculiar kind of legal organization whose special character is rooted in the conditional world of social fact.[1]

It will be well after this unavoidable excursus into the technique of Kantian jurisprudence to try to follow out Stammler's theory of the state in language not quite so much the copyright of one school of thought. It is a relief which most lawyers will welcome when Stammler says that the peculiar character of the state has its foundation on the solid ground of historical fact. But it is also rather a shock to learn that the mark which does distinguish it from all other legal organizations is the fact that it comprises the inhabitants of a particular territory.[2] That this is a very poor mark of identification Stammler readily admits. It is his express view that all legal associations—whether states, churches, or trade-unions—are essentially the same in kind from a juristic point of view; so much so that which legal associations one chooses to describe as states is a matter of convention.[3] The distinction is rather a matter of convenient classification, possibly of compromise with certain irrational features of social organization. For the jurist they are all in character the same, namely, legal organizations, and each one has as such to declare the positive law of a certain association of human beings. They differ, not in their character as legal organizations, but only in the purposes they serve, the social needs which they protect. This brings us back to Stammler's account of social purposes as the content of law. It is at the bottom of his theory of legal organizations, and we must be careful not to confuse it with another account which sounds similar, but is very different, that of Ihering.

For Stammler the purpose does not create the law.[4] From the juristic point of view it is not a psychological cause bringing positive law in its train. It was because Ihering could see purposes in this light only that he was doomed to fail in his attempt to discover

[1] *Rechtsphilosophie*, par. 136 and par. 39, n. 1.
[2] *Ibid.*, par. 136.
[3] *Ibid.*, par. 136, and esp. par. 108.
[4] *Ibid.*, par. 18, n. 10; par. 30, n. 1.

the universal features of Roman Law, its *Geist*.[1] Psychological investigation can give us only single suggestions taken at random; it does not imply and cannot produce any standard of value. The jurist's interest in social purposes is therefore not a psychological but a 'critical' one. He must consider each purpose not as a psychological cause but as a peculiar organization of the matter of social experience, a logical principle which brings unity, the unity of law, into that experience. 'Purposes do not create the law; the law is a peculiar composition of purposes' (*Zwecksetzung*).[2] Thus the idea of law is to be defined, not in utilitarian terms, but as that idea of pure will, that guiding thought of pure community which is, as we have seen, the presupposition of every legal judgement.

How then are we to determine whether an association of men constitutes a legal organization, whether it is entitled to the status of a legal subject? Stammler's answer to this question is a hymn in praise of juristic logic. The association is a legal subject if, by the application of what Stammler calls the concept of legal will, it is intelligible as an end in itself. The details of this subtle feat of the intellect need not trouble us. For our purpose it is important to concentrate on what it implies as to the nature of this legal subject. Its foundation, Stammler explains,[3] does not lie in the natural capacity of men. True, it is bound up with the content of men's wills, their common purpose, the purpose of the association. But the psychological fact that a group of men are striving to pursue a common interest does not determine it as an association with the jural capacity of a legal subject. This results from its interpretation in terms of an *a priori* principle which by its magic touch gives all social phenomena a legal value. Where Austin put the arbitrary discretion of a sovereign power, Stammler puts an *a priori* logical principle, the formal logic of juristic thought.

We are now in a position to see more clearly what Kantian rationalism, and especially that of Stammler, really stands for. Law is a certain structural formation of those purposes which move men to action. To discover the general principles of this formation we must abstract the purposes from the living social world of their origin and ask ourselves what is essential for the under-

[1] Ihering, *Geist des römischen Rechts*. Ihering's jurisprudence is discussed *infra*, part iii, ch. ii.

[2] *Ibid.*, par. 18, n. 10. Cf. motto of Ihering's *Der Zweck im Recht*—'Der Zweck ist der Schöpfer des ganzen Rechts'.

[3] *Ibid.*, par. 3, n. 4.

standing of them as an harmonious and orderly system of ends. We shall then discover by the help of logical analysis certain absolutely valid principles of juridical organization, which will guide us safely in judging what purposes are deserving of legal recognition and how these purposes are jurally related. It is this point of view that moved Ihering to the protest—'Life does not exist for the sake of concepts, but concepts for the sake of life'.[1] It is the same point of view which made Jacobi cry out—'The law is made for the sake of man, not man for the sake of law'. It is, however, a point of view which still appeals strongly to men and will probably continue to do so through its claim to logical accuracy. Moreover, by a curious fate it has tended to support certain conclusions about the nature of legal organizations which are shared by the adherents of quite different schools of jurisprudence. If these conclusions are wrong, it is important that their common error should be brought to light. If they are right, then it still remains of vital importance to show how entirely different methods of juristic inquiry can produce the same result.

Stammler leaves no doubt as to his own view of the relation between law and state. They are not one and the same thing.[2] The former is a system of pure unconditioned principles of legal organization, whereas the latter is a peculiar kind of legal organization whose character is bound up with certain empirical considerations. The distinction at first leads one to expect a definition of the state based upon the view of it as a social reality. But Stammler does not intend anything of the kind. The state is for him, as a jurist, a purely juristic conception. Viewed as an historical fact it certainly has its origin in social intercourse. But this has nothing to do with that purely juristic conception of it which, as jurists, we are seeking. This conception cannot be got from the study of any social reality as such, but only through the exercise of a peculiar juristic logic. As Kelsen puts it, the state as a social fact exists for the jurist as little as the symphony exists for the physiologist.[3] Jurisprudence then has its own peculiar interest in the state and is fully equipped to satisfy that interest without encroaching upon the preserves of any other science. It has its own logic, its own principles of organization, and these, when applied to the purposes

[1] *Geist des römischen Rechts*, vol. iii, p. 302.

[2] *Ibid.*, par. 136.

[3] Kelsen, *Soziologische und juristische Staatsbegriff*, p. 116. Kelsen's jurisprudence is discussed *infra*, part i, ch. iii.

prevailing in society, give us a complex of legal rules which constitute a legal organization.

So far, of course, Stammler has offered us a means of discovering juristic truth—in other words, the principles of good legislation. But we cannot have legislation without a legislator, law without a lawgiver. We cannot exclude from the problem of juridical organization the need of an ultimate authority or supreme explicator of the law. This Stammler admits with reservations. He recognizes the necessity that, in cases of dispute between different legal subjects—whether these be individuals or associations—there should be some subject with the right to have the last word. This subject will then be the bearer of sovereignty in the state.[1] But who is to be this sovereign in any particular state cannot be decided *a priori*. It is a question of fact and will have different answers in different states. For Stammler the problem of sovereignty is thus comparatively insignificant, and for obvious reasons. The business of his sovereign is not, like that of the Austinian sovereign, to *create* the law, but merely to *declare* it. The criterion of what the law should be is not left to the arbitrary discretion of the sovereign but resides in certain infallible formulae of juristic thought. These the sovereign does not create. They are not the product of any organization; they are the presuppositions of all legal organizations. They are, so to speak, a law to which the sovereign is himself subjected, a law unto the legislator. That is why the definition of law which Stammler's jurisprudence gives us includes neither that idea of an explicator of the law, the need of which Austin realized so fully, nor any recognition of those extra-legal sanctions of law without which it cannot be the law of any human society but at best merely an organizing principle which organizes nothing, a guardian without a ward. But this criticism will require careful explanation which cannot be set forth until we have examined the consequences of Stammler's definition in so far as it affects the juristic interpretation of corporate life.

Against the Austinian sovereign lies the great objection that it cannot be held responsible. Limited only by the arbitrary bounds of its discretion, it remains free to grant or withhold from any association within its jurisdiction the status of a legal subject. It is just this view, that legal rights presuppose a non-legal power which creates them, that Stammler unequivocally opposes. In place of

[1] *Ibid.*, par. 114, n. 7.

this power he puts a purely legal authority, an organization whose character is legal through and through. We can no longer speak of a highest power (*höchste Gewalt*) in the state, but only of a highest legal organization (*oberste Rechtsordnung*). An association will found its claim to legal recognition not on the concession of a sovereign power, but on the possibility of construing it according to certain legal norms, of co-ordinating it as a complex of legal relations within a comprehensive and all-inclusive system of legal relations. Thus if the state is the entire legal organization, the association within it will signify a part of that legal organization (*Teilordnung*).

This is at bottom a profound advance on the Austinian theory. It is a genuine attempt to preserve legal judgement from an arbitrary criterion. It seeks to solve that most perplexing of juristic problems, how the legal sovereign can itself be bound. The Austinian sovereign is non-legal. It creates the law and cannot be bound by its own creations. For Stammler, however, the bearer of sovereignty within the state is merely the servant of certain legal principles which he is bound to apply, so that in the strictest sense we can speak only of the sovereignty of the law. Thus the state and all legal associations presuppose the law. It is from the ideal categories of legal thought that they obtain their legal definition; and since the former are unchanging and objectively valid, the latter are subject to a sovereign authority bound by its own unalterable nature.

But the gain of a sovereign authority bound by its own nature is no real gain unless that nature is sound. A criterion though unchanging is no criterion unless it can explain adequately those values which are referred to it, and unless it can be stated. Authority does not vindicate itself merely by obeying its own commands. Stammler's formulae must therefore prove themselves capable of dealing adequately with juristic problems, of supplying us with clear statements of the concepts necessary for the practical work of law, before his theory of legal organizations and their presupposition of the law can deserve the support of the jurist. But it is just in the problem of the relation of the state to corporate bodies within it that his theory proves practically unworkable and theoretically beset by the same dangers as attend the Fiction Theory.

The clue to a thorough understanding of Stammler's theory lies in his method of juristic thought. The state, the church, the rail-

way company are all legal organizations in so far as they permit of being considered as ends in themselves (*Selbstzwecke*), as peculiar legal wills. As we have already observed, this does not mean that their characters as legal organizations are derived from and inherent in certain *social* realities underlying them: the nation, the congregation, the shareholders of the company. Their definition as legal subjects follows from the treatment of their respective purposes by the unifying categories of legal thought, those *a priori* conceptions which are discovered by analysing the bare idea of law. But can these categories interpret legal phenomena? Can they explain the co-existence of different legal organizations within a comprehensive legal organization, each one nevertheless entitled to a life of its own, each one nevertheless looking within itself for the inspiration of its corporate life? Can they avoid the false and dangerous views which result from the Austinian theory of sovereignty and its complementary Concession Theory?

The answer to these questions brings to light a fundamental similarity between the theories of Stammler and Austin. The main and ever-recurrent theme of Austinian jurisprudence is the idea of *unity*, the unity of society as a legal organization. This, for the Austinian, is the real aim of law, its very life-blood. It can, moreover, be achieved only if there is a single sovereign power which dispenses all legal rights, of which all corporate bodies hold their rights as legal subjects. The Austinian can thus maintain the unity of the state only by sacrificing the real nature of the differences within it. But so obsessed is he with this idea of unity that the sacrifice does not trouble him.

Now this is just as true of Stammler. 'All positive law', he writes, 'is an attempt at just law.'[1] The purpose of law is the introduction of justice within the life of society. But Stammler writes to the increasing accompaniment of the old Austinian theme that unity is the aim of law. His method produces results which differ from those of Austin only in that they give us an hierarchy of conceptions while Austin's give us an hierarchy of powers. The latter involves the complete subordination of the lower powers to the higher powers and of all to the highest power, the sovereign. Stammler's hierarchy of conceptions is the same in form. The unifying categories of legal thought which introduce order into the world of legal phenomena are themselves obtained by the analytical

[1] *Die Lehre von dem richtigen Recht*, p. 31.

expansion of a single highest conception, the idea of the *permanent union* of all human purposes.[1] Stammler admits that these conceptions do not exist apart from an empirical content which is historically determined.[2] But he does treat them in isolation from that content, as if they did exist apart from it. The legal character of this content is determined by its form, and this form is produced by the *a priori* conceptions working on that content. The inevitable conclusions of Stammler's jurisprudence must therefore have their origin in the intrinsic character of that system of pure conceptions, the unifying categories of legal thought.

To attempt a minute examination of how Stammler deduces his various legal conceptions would be to go beyond the obvious limits of this work. But it is necessary for our immediate purpose to examine the essential character of those conceptions in general. Stammler's method—the critical method of Kant—traces logically the presuppositions of any legal judgement, and its aim is to reach a final conception which is unconditioned and true in itself. This conception then becomes the touchstone of all our legal conceptions. From its analytic expansion we derive a system of categories for the co-ordination of legal phenomena. This is for us the point of crucial importance in Stammler's method. The categories of legal thought are all the product of, and dependent on, a highest legal conception. If the absurd analogy be allowed, the legal mind has become a feudal hierarchy of conceptions. It certainly cannot fail to produce in its thought about legal phenomena a system of legal organizations, legal subjects, which bears the imprint of this feudal hierarchy. This clearly follows from Stammler's theory of legal organizations. Every association becomes a legal organization and functions as a distinct legal subject when and in so far as it is understood as an end in itself. This does not refer to any natural capacity inherent in a group of individuals.[3] It means simply that an association enjoys the status of a legal subject in so far as the application of a certain category of legal thought to its purpose produces a peculiar legal will. The latter, as we have observed, signifies a peculiar content of social life logically organized by the categories of legal thought.[4] But how are these distinct legal sub-

[1] *Rechtsphilosophie*, par. 136.

[2] *Ibid.*, par. 4 and par. 3, n. 1.

[3] *Ibid.*, par. 111, n. 4.

[4] Stammler opposes Windscheid's attempt to search for rights without subjects. He maintains that the scientific explanation of every content of will makes the category of legal subjectivity essential. *Ibid.*, par. 120, n. 1.

jects related to one another? How are these distinct legal organizations to be co-ordinated in one comprehensive legal organization? Stammler subordinates all legal judgement to the fundamental conception of law, and this is the idea of the permanent union of all purposes—that is, of all legal subjects. In other words, he subordinates all juridical organization of society to a conception of formal unity. The essential character of all legal conceptions, including that of legal subjectivity, is that they confirm this formal unity. They are, so to speak, emanations of this conception of formal unity, products of its logical analysis. Thus the application of the conception of legal subjectivity to associations will be governed by the conception of the formal unity of all human purposes. This conclusion presents a strange similarity to the Concession Theory. Their origins, of course, differ; their implications are essentially the same. In Stammler's theory no less than in the Concession Theory the legal status of an association is essentially a *concession* from a source external to the association considered as a living social reality. The association enjoys that status in so far as it conforms to a conception of formal unity. As in the Concession Theory, the subjectivity of the association is in principle derivative and independent of any extra-legal sanctions to be found in the association as a living group.

On closer consideration it does not appear so strange that Stammler's theory should suffer a fate similar to that of the theory to which it is first and foremost opposed. For where Austin saw a *power* spreading and conceding itself in bits, Stammler sees a *conception* expanding itself and permeating the whole of juridical organization. The association does not enjoy its legal status as a right inherent in its nature. It is a deduction from an external source of legal values. It is a concession which depends upon the possibility of co-ordinating its purpose within an ideal formal unity of all purposes. The bearer of sovereignty in the state, being the trustee of the law, will therefore *grant*, or, better, *create* the legal subjectivity of corporate bodies within its jurisdiction. Stammler's theory thus carries with it all the implications of the Concession Theory. In truth the same can be said in regard to the Fiction Theory, though Stammler would certainly deny the charge. Nothing could be more foreign to his jurisprudence than the idea that his legal conceptions produce fictions. They produce legal realities—that is, realities from the legal point of view. With the truth

or falsity of this assertion stands or falls his whole theory of legal organization.

Stammler defines the state as a peculiar legal organization of social life.[1] His definition refers distinctly to the existence of society (*Gesellschaft*) where the purposes of men are born and fostered. But Stammler's interpretation of this social background, which attends the idea of any legal organization, amounts to a virtual neglect of it. Kelsen is, as we shall see, right in holding that from Stammler's point of view society viewed as a psychological or sociological fact has no place in or meaning for the legal judgement, and that therefore the state is to be defined not as an organization of social life but as an organization of legal norms. Until this inconsistency of Stammler's thought is corrected we cannot hope to appreciate truly where his jurisprudence leads. Kelsen, who develops the neo-Kantian legal philosophy with rigorous consistency, removes this error. But before we proceed to examine his work, it will be well to see where Stammler leaves off.

To appreciate Stammler's position, we must bear in mind his great debt to Kant. He accepts Kant's view of freedom. The self is moral in so far as it is rational, in so far as its desires are treated in accordance with reason. Reason itself consists of a system of *a priori* concepts which constitute the equipment of every mind. Since freedom is that condition of the self in which it determines itself in accordance with its own nature, there can be only one free will and that is moral or rational will. Hence Kant's famous theory of the pure moral will with its rational form, and the categorical imperatives which issue forth from it with the infallibility of a divine judgement. Now this moral will has reference only to the 'inner' self; it operates only within the private sphere of the individual conscience. But man lives in society. His life stretches beyond the confines of his 'inner' self and gives rise to external or social relations.[2] So there arises the problem of jurisprudence, how a society of rational beings in external relations to each other can exist. The Kantian solution—and it is that of Stammler—is based upon the same view of freedom as that which inspired the Kantian theory of the moral will. Society is made up of rational beings each an end in himself. Viewed as empirical realities these individuals cannot give us a social unity. The Kantian theory of

[1] *Wirtschaft und Recht* (3rd ed.), p. 117, and *Rechtsphilosophie*, par. 136.
[2] *Rechtsphilosophie*, par. 32 and 33.

the moral self leaves an individualism as its legacy to jurisprudence, which must therefore seek its synthesis of social life by other means than those of psychological or sociological inquiry. Now the universal characteristic of all individuals is their rationality. It is in their rationality that we can find that same responding note which the legal judgement must call forth in all individuals. If, therefore, the purposes of social life are organized in accordance with the principles of pure reason, we shall realize the ideal of juridical organization. Society will be moulded in the form of rationality and the character of its life will be just. Laws will then be rational and therefore consistent with the freedom of the 'inner' or moral self whose essence is its rationality.

The objection usually brought against the Kantian theory of the moral will is that it gives too formal and empty a conception of it, 'a will that wills nothing'.[1] To pursue this criticism in the interests of moral philosophy would be to go beyond our present purpose. But we cannot put it entirely aside, for it throws great light on Kantian jurisprudence. The moral will is a system of pure *a priori* categories which when applied to our experiences gives them a moral complexion. Life becomes subjected to the scrutiny of rigid concepts, and morality becomes the handmaid of a logical catechism. This is just what happens in Kantian jurisprudence. The legal will is also a system of pure *a priori* categories, which when applied to social relations gives them a legal complexion. Social life becomes subjected to a critical interpretation by certain rigid concepts, and law too becomes the handmaid of a logical catechism. This similarity between the Kantian theory of the moral will and the Kantian theory of the legal will is no mere accident. It points to a grave error which invites our most serious criticism, namely, the confusion of law with morality. The effects of this error are twofold, for the Kantian theory of law suffers not only through its confusion with moral issues as such, but also because it follows the path of a moral theory which is both inadequate as a solution of the moral problem and useless as a model for juristic theory.

This confusion of moral and juristic issues is bound up with that finality which the Kantian requires in the principles of jurisprudence. They must have the same objective validity and permanence as the principles of logic. He therefore abstracts the idea of justice, which is the *motif* of all law, and through its logical

[1] *Vide* Caird, *The Critical Philosophy of Kant*, vol. ii, p. 167, and pp. 173 ff.

analysis obtains certain categories of legal thought. These are the principles of legal organization, and only by their rigid application to social life can we hope to attain the ideal of justice, the end of law.

This is clearly a confusion of the jurist's interest with that of the moral philosopher. It is true that all legal judgements have a moral judgement as their background; they all aim at the realization of justice, which is a moral conception. But, for the jurist, this justice is no mere abstract idea. It is a value which does not exist apart from the living structure of society and which the jurist can discover only *in* that structure. Its realization is bound up with certain social as well as moral considerations. The jurist must inquire into the social sanction of law as well as into a social ideal in the light of which we must judge the character of human purposes. But the Kantian completely neglects this social sanction. From his point of view it does not concern the jurist, who deals with the general principles of all legal organization. He sees the history of law as the progressive application of eternal categories to the purposes of social life. But this view is of no more use to the historian than to the jurist. History manifests a change not merely in the social efforts of mankind but also in their conceptions of how these efforts should be legally organized. The history of law does not exhibit a single permanent ideal embodying itself in a changing society like a skeleton key that fits any lock. It presents a world of shifting ideals moving with the times, moulded by the temporary exigencies of social practice as well as by the more permanent influences of ethical and intellectual movements. The dualism of form and matter, of law and society, with which the Kantian jurist works, is the result of an intellectual abstraction, and as such it cannot explain the historical process in which they are inseparably bound up with each other. The distinction is an abstract one and must be treated as such. To consider one of the abstracted elements, the form, as self-determined is to neglect that measure of error which all abstract thought involves in so far as it removes us, according to the degree of its abstractness, from the world of living fact.

It is this error which Stammler, like all Kantians, has failed to appreciate, and which undermines his whole theory of legal organization. He admits that the aim of law is the just organization of society. But in order to discover the general principles of that

organization he abstracts from the living world of social relations and equates the results of his abstraction with the universal principles of legal organization. His error is a logical one and demands, as such, a fuller treatment than we can give it. But it is not necessary for us to inquire into its implications for a theory of knowledge. It is sufficient to take our stand on the simple objection that jurisprudence is an empirical science in so far as it does not aim at the appreciation of certain abstract conceptions for their own sake. It is a science in the service of a *practical* aim, the just regulation of social life. The meaning of this aim as an aspect of our spiritual life is not the concern of the jurist but of the philosopher. For the jurist the aim is a fact. It is elementary for him, like the fact of political organization, the social sanction of law. He is concerned with the abstract idea of justice, not as an aspect of our whole spiritual life, but as the intrinsic character of a complex world of social relations in which it is realized and apart from which it ceases to have any juristic meaning. This Stammler has failed to appreciate. He has confused the abstract idea of justice in its metaphysical sense with the living ideal which the jurist pursues in the shifting world of social experience.[1]

This explains the abstract and formal character of Stammler's jurisprudence. The human purposes which he equates with the content of juristic thought are not to be considered as psychological facts. As such, they cannot be made to take on the pattern of rationality sketched by the system of *a priori* categories. But if life will not fit concepts, it must be made to do so. Stammler, therefore, abstracts the purposes of social life from their living context and considers them purely as ideal ends. The interest of jurisprudence becomes teleological and is carried on by means of certain logical formulae. The result, we are assured, will be legal judgement based upon principles that are eternally and objectively valid. The criterion of our legal thought will have an absolute finality. This recommendation is of no avail, for Stammler's method is incapable of dealing adequately with juristic problems. The juristic constructions which it gives us are the results of working with falsified data, which is the outcome of confusing the aim of law with that of morality. The data of the jurist, the materials on which he works, are not abstract ideas but living forces. Society

[1] As the Hegelian logician would put it, Stammler has confused the abstract universal with the concrete universal.

is for him what it really is, no intellectual abstraction but a world of living human beings. It is not merely an idea but also a fact. True, the social efforts of men are not intelligible apart from the purposes for which they are made. But these purposes are not mere ideas. They are also psychological facts, and apart from their character as such they are not the 'stuff' of social life. Abstract them, treat them as intellectual abstractions, and they cease to be the material of juridical organization. They have no longer that social reference without which they have no meaning for the jurist whose interest lies in the organization of living society.

To return to the legal interpretation of corporate life: law must fail to deal adequately with its vital problems so long as it proceeds by the abstract and formal method which Stammler advocates. The legal character of an association of men cannot be defined by abstracting its purpose and considering it as an end in reference to an ideally constructed system of ends. This will lead to the understanding of corporate life not in the juristic but in the moral sense. It is the path to a 'philosophy of institutionalism', the moral interpretation of communal life. So long as the jurist acquiesces in such a line of inquiry he is evading his own problem. It is not his business to judge *ethically* the purposes for which men unite. It is in the light of a *social* ideal that he must examine them. The Kantians have confused this social ideal with an ethical ideal. Society is, for the jurist, not merely a complex of purposes which have a moral significance for the life of man. It is an organization of living men who have those purposes and are bound together through their common pursuit of them. Apart from their living authors they are mere abstractions denuded of that very character which gives them a meaning for the jurist. The laws of man do not govern ideas; they govern men. The jurist, investigating the nature of those purposes which form the common interests of men, must remember that they are the purposes of living men. Apart from them men cannot live, and apart from their living authors they are not the complete material of social life on which the jurist must work.

If we may anticipate somewhat the conclusions of this work, the jurist's interest in the nature of corporate life lies not in a treatment of its purposes abstracted from their living context, but in their examination within the living social world of their origin. In brief, not the purpose, but man in pursuit of the purpose, is the real

content of juristic thought. The association of men viewed as a legal phenomenon does not present merely a purpose to be considered in abstraction, but a group of men striving to realize that purpose. The world which the jurist studies is the real world of social experience where ideals or purposes are not merely abstract values but living facts, the expressions of the actual efforts of men. Only if the gaze of the jurist rests upon the concrete world of our social experience can he give to his jurisprudence that empirical value without which it cannot realize its practical aim, the legal organization of society. This does not deny the jurist a constructive interest. Nor does it confuse his interest in the general principles of law with the lawyer's restricted interest in positive laws. It merely emphasizes that his data are to be found in the concrete world of social experiences, where men are not mere rational forms and society a system of such forms, but where men are made of flesh and blood and society is nothing but what they make it. How far removed is this point of view from that of Stammler! Confusing the moral and the juristic points of view, he begins by falsifying the real data of juristic thought. His 'purposes' are not the substance of social life, and their systematization cannot guide us in the legal organization of society.

But Stammler's jurisprudence is doomed to failure not only because it confuses moral with juristic issues. It is further marred by the formality and abstractness of the moral theory which serves as its guide. Logically it is impossible to see how Stammler can bridge the dualism of form and matter, law and society, with which he works. There is no reason why the principles of law which are determined *a priori* apart from society should be the valid principles of its legal organization. We have already drawn attention to the consequences of the cut and dried formulae which the *a priori* method produces. In a disguised fashion there appears once again the implications of the Austinian Theory of sovereignty. Legal subjectivity is still the concession of a sovereign authority, only it masquerades as the judgement of Reason. The inadequacy of this Reason is the result of the method by which it is grasped. Mere logic will not solve the problems of life. Truth is not machine made. Where the belief prevails that it is so made, the results are not truths but fictions. And this is the nemesis which Stammler's method brings upon its own conclusions. The formulae with which Stammler works are unrealities from the juristic point of

view. They do not interpret the juristic character of social life. They do not necessarily imply that life as their content. Their meaning and place is and remains within that world of forms where they are discovered. This is the vital spot in Stammler's jurisprudence. Its implications are of great theoretical and practical importance. Legal organizations, such as the state or the church which his abstract formulae construe, are from the juristic point of view not social realities but merely formal constructions. We cannot truly speak of the state in its juristic sense as a legal community, but only as an organization of norms or legal relations. Stammler is plainly inconsistent in so far as he retains a *social* reality as the content of legal organizations.

This is indeed the criticism which is brought against him by Hans Kelsen, a jurist who follows out the implications of Kantian jurisprudence with strict consistency. It is in his work that we can see the goal to which we are inevitably led by the application of the Kantian critical method to juristic problems.

III

NEO-KANTIAN JURISPRUDENCE (*continued*): KELSEN

HEGELIAN JURISPRUDENCE: BERNARD BOSANQUET

Importance of method — *Naturrechtstheorie* — Kelsen's criticism of it — his aim — his 'purely normative' jurisprudence — his theory of the state — his use of metaphors — his inconsistency in using them — reason for his use of them — analytical character of his jurisprudence — his account of corporate bodies as 'parts of the entire legal organization' — his recognition of their social foundations — implies refutation of Kantian dualism of form and content, norm and fact — criticism of Kelsen's juristic principles — criticism of his method — results of discussion of Kantian jurisprudence — the Philosophical Theory of the state — reason for discussion of it in connexion with rationalistic theories — Bosanquet — difficulties arising from his use of terms — his aim — the means by which he proposes to realize it — his distinction between actual will and real will — identification of real will with ideal will — Bosanquet's account of the state — its aim — it differs from that of Kelsen — its similarity to Austinian Theory — Hegelian identification of reality and value — individual freedom and the Philosophical Theory — *petitio principii* in Philosophical Theory — Hegelian idealism and pragmatism — dangers of Philosophical Theory — same implications as Concession Theory and Fiction Theory — cannot explain international law — grounds for its rejection, two: destroys distinction between actual and ideal, and confuses juristic with metaphysical issues — jurisprudence and psychology — logical error of rationalism — contribution of rationalistic jurisprudence.

IT is a peculiar danger which constantly attends our efforts to think about the problems of life that we may become too immersed in the niceties of logical analysis to perceive the distinction between that life and our thought about it. Thought is either a panacea or a disease. Either it helps us the better to understand and organize our lives, or it leads us into a labyrinth of abstractions in which life loses all its meaning and must surrender to the deadening influence of a logical catechism. Nothing can guard our thought against such a fate except a clear insight into its method, a careful scrutiny of its implications. But this seems in itself no guarantee of our safety in the adventure of reflective thought. No group of jurists has shown a greater interest in the method of juristic thought than that of the Kantian school, and yet our chief criticism of its jurisprudence is that it would mould social life in the pattern of a unity derived from a formal logic. This is not necessarily a ground for scepticism; but it is a warning against

the temptations which would lead us into a false intellectualism. Whether the distinction between life and thought is in the last resort valid is a philosophical problem which does not concern us here. Where, however, our thought is admittedly abstract in so far as it deals with but an aspect of life, the distinction is one of which we dare not lose sight. It reminds us that our abstract thought gives us an intellectual creation which is not to be equated with any living reality. It is but a limb torn from the body of living truth. It cannot be restored to that body unless the other facts are taken into consideration. In other words, only if we take into account the presuppositions of any intellectual abstraction and its limitations as such, can it have any value for the organization of our lives.

No mention has so far been made of that theory of *natural law* which plays so large a part in Kant's jurisprudence. The omission was designed in order not to complicate unnecessarily our discussion of Stammler's theories. It is, however, necessary to introduce it at this point, for it is just that part of Kantian jurisprudence with which Kelsen disagrees so strongly. He begins his criticism of Stammler's theory of the relation of law and state with the objection that it follows closely the path provided by the theory of natural law.[1] A full examination of this objection will explain Kelsen's own position and why it is the logical result of developing consistently the fundamental principles of Kantian jurisprudence.

The theory of natural law in its widest sense is rather a theme of human thought than a specialized theory. It is an idea which throughout the ages has haunted the minds of men, and supplied their dreams if not their convictions. But as such it does not come within the field of our present interest. The theory of natural law with which we are concerned is Kant's *Naturrechtstheorie*, which is bound up with the explanation of society as a legal organization by means of an original social contract. There is no reason to suppose that Kant considered the idea of this contract to be anything other than a fiction from the historical point of view. It was for him merely a fable which expressed vividly the idea that the state rests upon an implied agreement between its members which has the binding force of law. So much he inherited from Rousseau. But he was further troubled by the juristic problem of how that agreement could have the binding force of law. To solve it he

[1] *Der soziologische und juristische Staatsbegriff*, p. 143.

introduced *the law of nature*. If the social contract was to have binding force it must obtain it from a law prior to it. This was the law of nature which Kant identified with the law of reason. It followed that the state was a legal association which derived its legal character from a system of natural law logically prior to it.

The reason why Kelsen opposes this theory of natural law is really its connexion with the idea of a social contract. The latter he challenges neither as a fiction nor as a metaphor for the origin of social life. He simply objects to its introduction into the sphere of juristic thought. It means that the state as a juridical organization is bound up with the fact of social intercourse, and this, Kelsen maintains, is a confusion of the juristic with the social or sociological point of view. It is one thing to view the state—a somewhat indefinite term—as a social organization, another to consider it purely as a legal organization. In the former our interest lies in an empirical world, in men as psycho-physiological beings. In the latter we are concerned with abstract laws. Their province is an ideal one, like that of geometry, and from a normative point of view alone are they intelligible. Kelsen therefore objects to Stammler's definition of the state as a legal community and defines it as an organization or system of legal norms. The idea that the state presupposes the law—the very foundation of the theory of natural law—thus becomes meaningless, and in its place we are given the theory that law and state are essentially one and the same thing, or as Kelsen also expresses it, aspects of the same thing. This difference between the theories of Stammler and Kelsen is not the result of any fundamental difference in their ways of approaching the study of juristic problems. Kelsen, like Stammler, adopts the 'critical' method of inquiry. But whereas he develops its implications consistently, Stammler does not. Accordingly Kelsen's theories permit us to see more clearly the logical results of Kantian jurisprudence.

What Avenarius did for natural science, that Kelsen sets out to do for jurisprudence. He wishes to purify it from all irrelevant considerations, to separate its province from that of other sciences with which it can have nothing in common. It is his chief criticism of most current theories of the state that they confuse the juristic with the social point of view. These can have nothing in common, for 'two different and mutually exclusive processes of thought must produce two equally different and mutually exclusive objects

of knowledge.'[1] Social theory is concerned with the actual facts of social experience, and the method of its inquiry into them is the examination of causes and their effects. But this causal relation is discoverable only in the world of sensible experience and therefore cannot be the object of juristic inquiry. For the world of juristic thought is one of pure norms, an ideal world of abstractions, a world of pure thought.[2] Not to an inquiry into causes and their effects will this world yield its truths. Only from a purely normative point of view can we grasp its nature. It can, of course, be studied from other points of view, but such inquiries will not satisfy the jurist. The normative point of view can alone bring us to understand legal norms as such, as ideal values and not as empirical facts. This, then, is the point of view of jurisprudence, which is an exclusive science. Like the science of logic, it is complete in itself and contains its own criterion of truth within it.[3]

We can now see why Kelsen disagrees with Stammler and thinks he has failed to do justice to those fundamental principles which they both accept. Stammler introduces into a world of pure norms a social element which is entirely foreign to it, and thus meaningless from the juristic point of view. Laws are mere norms, abstract conceptions. The attempt to explain their nature by referring them to the world of social organization constitutes a serious logical error. It is a *μετάβασις εἰς ἄλλο γένος*. It is to abandon the very problem of jurisprudence and to put an entirely different one in its place. Thus Kelsen separates the ideal world of norms from the actual world of fact, and identifies the former with the world of juristic thought. He treats it as an independent and exclusive system of ideal conceptions and pronounces the normative point of view alone capable of leading us to a knowledge of it. Now this is just what we must accept if we pursue consistently the implications of the Kantian dualism of form and matter, law and society, with which Stammler works. The social contract disappears as an unwarranted and useless assumption, and the theory of natural law, which is merely its prop, loses that meaning which Kant gave it. Kelsen is the faithful disciple of what are the fundamental principles of Kantian jurisprudence.

Kelsen defines the state as an organization of legal norms. Law and state are for him one and the same.[4] In holding this view he is

[1] *Der soziologische und juristische Staatsbegriff*, p. 110.
[2] *Ibid.*, p. 214.
[3] *Ibid.*, p. 79.
[4] *Ibid.*, p. 87.

simply faithful to the fundamental principles of his jurisprudence. The province of juristic thought is a closed system, and it presents for our consideration nothing other than norms, abstract conceptions. To introduce into the definition of legal phenomena anything other than norms would be to overstep the hard and fast boundaries of jurisprudence and to confuse juristic with social or other issues. But it is not merely the claim of logical consistency that Kelsen makes for his definition of the state. He maintains that it settles once and for all the thorny problem of the legal responsibility of the sovereign, which other theories of sovereignty cannot solve. The introduction of a non-legal social element into the definition of a juridical organization necessarily places it to some extent outside the realm of legal obligation. Either it means that law presupposes the state as a social organization which creates it, and the insoluble problem arises of how the creator can be bound by its own creations; or else it means that the state as a social organization presupposes the law, and this is the same as saying that the law is an independent world of value.[1] Consequently the very mention of any social reality in the definition of legal phenomena is as superfluous as it is meaningless. Kelsen therefore maintains that the identification of law and state is the only course open to the jurist who would exclude any arbitrary or capricious element from his legal organizations.

It would be merely superfluous to reiterate here the objections which were raised against Kantian jurisprudence in the last chapter, though they apply equally to Kelsen's theories. It is rather for the purpose of continuing our criticism of Kantian jurisprudence that Kelsen's work has been introduced. It permits us more easily to grapple with those of its conclusions which have a more immediate reference to the main problems of this work. To this we shall now proceed.

According to Kelsen, juristic thought is never about anything but legal norms. The world into which it inquires is an ideal one, and so it cannot give us realities but merely abstract norms. He therefore excludes any reference to the empirical world of social intercourse from the definition of any legal organization. But when he attempts to determine the limits of jurisdiction which a scientific legal organization enjoys he too makes free use of

[1] Kelsen thinks that Kant implied, if he did not explicitly affirm, the identity of law and state. *Vide ibid.*, pp. 141–2.

anthropomorphic expressions. 'Personality' and indeed 'corporate personality' are expressions used by him in such a way that it is evident how difficult it would be for him to abandon them. Moreover, he himself admits that these are anthropomorphic expressions, symbolical clothings for something very different from that which they signify in their literal meaning.

But it is not wholly unreasonable that the reader should grow suspicious when a jurist so scientific and rigorously determinate in thought and language as is Kelsen returns, in the last resort, to the use of metaphorical expressions which are drawn from a province already declared by him to be utterly foreign to that of juristic thought. It is at least reasonable to suggest that metaphors such as 'corporate personality' have made their way into jurisprudence, and especially into that of Kelsen, by no mere accident. The best metaphors necessarily involve loose thinking, but their choice, especially in scientific thought, is probably never so capricious as to exclude any kinship whatever between that which they describe literally and that which they describe metaphorically. The scientific thinker will always call 'a spade a spade' if he can. If he cannot it will be because it is not true, and if he imports into its full description a metaphorical expression drawn from some other object of experience, it will be because that object has some essential kinship with the spade. Our most abstract thought, it seems, cannot get away from the use of terms which have their origin in the spatial-temporal world, but we do not consider this a criticism of our abstract thought. We recognize thereby that our abstract thought is bound up with the spatial-temporal world. If we fail to recognize this our thought becomes meaningless.

This is precisely the fate of Kelsen's juristic thought. Its language is drawn from that used to describe social phenomena, but these he rigorously excludes from the domain of juristic thought. To be consistent he should refrain from using such expressions as 'corporate personality' to describe a legal organization. He should speak of it as nothing but a complex of legal norms. He should restrict himself to the description of any legal phenomenon whatever merely in terms of legal norms.

Kelsen does not mean to deny this. He insists that when we attribute personality to the state we are merely making use of a convenient technique.[1] It does not change the content of that

[1] *Der soziologische und juristische Staatsbegriff*, p. 199.

complex of legal norms which is all that the state can signify to the jurist. It is not essential to the constitution of a legal organization but merely part of the machinery by means of which the jurist controls his thought. But no one is more insistent than Kelsen on the intimate relation between the way in which we think and the results of our thinking.[1] It is his very logical creed that each science, each department of human knowledge, has its own methodological equipment; and that if we change that equipment we change the object of our thought. It is no less than a denial of this logical doctrine when Kelsen introduces into the pure world of legal norms, even if only for the so-called purpose of technical convenience, a conception which refers to the province of social fact. But this is an inconsistency which he cannot avoid, for at the bottom of it lies an important truth.

According to Kelsen, the content of legal norms, the material into which they introduce the order of law, consists of human actions (*Handlungen*), not of men as biological, pyschological unities.[2] The legal organization presents an ideal scheme of these human actions, a systematic structure of the purposeful actions of men. Its norms determine these actions so as to make them coheré within a systematic unity and thus to realize the ideal of law. Their qualification as legal norms is, however, the result, not of any investigation into the actual world to which they are applied, but of a process of *a priori* reasoning. As with Stammler, so with Kelsen, this system of legal norms, the legal organization, is the product of a juristic logic which subordinates everything to a conception of formal unity. Were it possible to entertain a purely normative point of view such as Kelsen advocates for the jurist, our legal norms would come from the analytic expansion of this conception of formal unity, so that the legal administration of social life would mean the complete subordination of human actions to the ideal of a unity systematic through and through. But Kelsen realizes that this cannot be the last word of an adequate jurisprudence. The jurist never has to deal with but one all-inclusive legal organization or complex of norms. In private law he is confronted by distinct complexes of legal norms, so-called private corporations which somehow present the character of distinct legal organizations. In constitutional or public law he dis-

[1] *Ibid.*, p. 110. *Vide supra*, p. 51.
[2] *Ibid.*, pp. 85, 180, 197, and 134.

covers the legal organization of the state distinguishing itself from other so-called public corporations such as a church or university. And in the field of international law he finds states occupying the positions of distinct legal organizations. It is no solution of the juristic problem to say that this plurality of legal organizations should not be. That is merely to dismiss the problem. What the jurist must show is why a juridically organized society does not present a single uniform legal organization and how we must interpret the fact that the centres of legal organization are many and not one.

Now so long as we think of the legal organization as a complex of norms we can conceive of only one such organization. Kelsen's normative point of view can admit only one system which includes all legal norms. Its very dialectic is hostile to the idea that there can be many distinct complexes of norms. It asserts that the path to juristic truth lies through the centralization of all legal values—that is, through their treatment as products of the analytic expansion of a single idea, that of formal unity. The decentralization of legal values, the reference of legal norms to different centres of legal value, is incompatible with the fundamental demand of Kelsen's normative point of view.[1] That is why he cannot account for a plurality of distinct complexes of norms without the surreptitious introduction of a social reality by means of a metaphorical expression drawn from the field of social theory. In so far as 'corporate personality' is an expression—though, it may be, an inadequate one[2]—for a group of men living in a corporate life, Kelsen is in the last resort compelled to express in terms of a social fact what he emphatically asserts to be nothing but an abstract norm or ideal.

At this point Kelsen's perspective as a jurist appears to change. Even if we admit the personification of the state and other legal organizations to be a mere technical expedient, yet the fact remains, as Kelsen himself says, that they co-exist as distinct legal organizations because their contents are different, one being concerned with religious, another with economic activities, and so on.[3] Kelsen does not attempt or think it possible to deduce *a priori* these 'parts of the entire legal organization', as he calls them. Like

[1] *Der soziologische und juristische Staatsbegriff*, p. 106. It is important to bear in mind that Kelsen demands that the jurist's point of view should be *purely normative*.

[2] *Vide infra*, part ii, ch. iii; and part iii, ch. i.

[3] *Ibid.*, pp. 134–5.

Stammler, he recognizes that we cannot organize society legally unless we bring our legal principles to the concrete facts of social life. We must examine the actual character of human actions and determine the respective limits of different legal organizations accordingly. This is not essentially different from Stammler's introduction of the element of an actual community into his definition of the legal organization. Only whereas Stammler makes men as psycho-physiological beings the content of a complex of legal norms, Kelsen makes the activities of men constitute that content. This difference does not matter here. The important point in both cases is the reference to social facts, the recognition that different legal organizations, different complexes of legal norms, arise because of differences in those social facts.

This is itself a criticism of Kelsen's jurisprudence, for it refutes his dualistic treatment of form and content, norm and fact. It proves how inadequate the *a priori* principles of a 'purely normative' jurisprudence are for the purpose of legal organization. They are, as we have frequently had occasion to observe, logically subservient to a conception of formal unity. But this conception is totally incompatible with the inherent character of that content in which its realization is sought. The actions of men differ sometimes even to the extent of conflicting with one another. Groups of men engaged in the same activities form themselves into organized bodies, and each group then distinguishes itself as such from the others. In short, it is impossible to do justice to the pluralistic character of social facts so long as we attempt their legal coordination by the help of such a formal conception of unity as that which Kelsen gives us.

If the above criticisms are well founded we cannot avoid the conclusion that Kelsen's method does not give us juristic conceptions at all, but simply the formal principles of logical thought which are co-extensive with the entire field of our consciousness. They are just what Kant thought they were—pure forms of consciousness.[1] As such we cannot identify them with the principles

[1] This was the view of Kant in the *Critique of Pure Reason* (ed. Hartenstein), vol. ii, pp. 89–91. Kant here distinguishes between a 'general logic' which 'abstracts from all content of thought, and from all distinction of objects and deals only with the pure form of thought' (p. 91) and 'the special logic or organon of a particular science'.

How far Kant remained faithful to this view in his later work, is, of course, a matter of dispute which we must leave to the philosopher. The remarks in this

of juristic thought any more than with the principles of moral judgement. They enter into both, but in themselves are neither. Kelsen has failed to take into account the peculiar end to which juristic concepts minister. Accordingly, he has not appreciated the differentia of juristic concepts which distinguishes them from other scientific concepts. Nor has he recognized their practical function. The result is a confusion of practical concepts and theoretical principles.

It is this identification of the priciples of logic with the principles of jurisprudence that has indirectly led the neo-Kantians to the confusion of law with morality. The finality which they demand of their legal principles is the outcome of a method which leads them to a tyrannous intellectualism in the field of moral judgement. For it does not take into account that our thought grows comprehensive at the price of becoming more abstract, and abstraction takes us away, according to the degree of its abstractness, from reality. The neo-Kantians do not appreciate this, but think that the more abstract our thought becomes the higher is the truth which it conveys. Thus when, having reached the limits of abstraction, they discover certain axioms or self-evident logical formulae, they are led into the belief that these are the touchstone of that world from which they were originally abstracted. Hence the identification of the formal principles of logic with the principles of jurisprudence.

Had the neo-Kantians appreciated more fully the implications of a truth which they all emphasize, that there is no thought without a content, then they would have realized that even the highest of our abstractions have a meaning only so long as they have a content, and can be studied only in and through that content. We do not abstract in order to get away from reality, but in order to understand it. 'Divide et impera' is the watchword of our minds. But when we return from the world of our abstraction to the real world we must be careful to allow for the element of unreality which the very process of abstraction has introduced into our thought. In other words, only if we take into account the pre-

chapter are therefore meant to apply primarily to the neo-Kantians, Stammler and Kelsen, and to Kant only in so far as his jurisprudence can be said to follow the same path as theirs. The reader will thus understand that the term 'Kantian' is used, in this treatise, subject to the qualification that the neo-Kantians are the true interpreters of Kant's jurisprudence.

suppositions of our abstract thought, that which has been left out of our thought in order that we might better grasp that which has been taken up in it, can we bring the results of our intellectual inquiries to the service of life. It will be well here to state the precise significance of this for the jurist.

The 'purely normative' point of view which Kelsen advocates is logically impossible, and even if it were possible it would give us ideal principles which have no essential connexion with the actual world of social fact which it is their aim to organize juridically. Every principle must have a content if it is to have any meaning, and it cannot be studied apart from that content. Therefore the principles of jurisprudence cannot be determined apart from their content, the world of social fact to which they apply in any actual legal organization. Yet jurisprudence is admittedly an abstract science in so far as it considers society from one particular point of view. Its aim is not to study the ethics of social life, nor its economic structure, nor its political organization. Yet as a living reality society has all these attributes. The jurist's point of view is thus abstract in so far as it neglects to give an equal consideration to aspects of social life other than that of its juridical organization. But this must not be taken to mean that they can be entirely left out of our juristic thought. We must take into account the presuppositions of our abstract thought if it is to have any reference to reality. We must take into account the extra-legal sanctions of law if it is to have any point of contact with the real world of living society. The precise significance of this important statement will be fully discussed in the next chapter. It is sufficient here to say that these extra-legal or social considerations are elementary for the jurist, that they are the facts on which he builds, not something into which he inquires for its own sake. Nor does this mean that his science is merely descriptive and does not go beyond the treatment of social facts as natural facts. It is normative in so far as it studies the principles of legal organization by which we may be guided in the making of society something which it is not as yet. But these principles cannot be got from the play of an abstract dialectic. Their discovery must result from an investigation of the intrinsic character of social life. To apply the foregoing observations to the main problem of this treatise, it follows that, in studying the juristic nature of corporate bodies, we must look for their *sanction* in the *extra-legal* province of social organization and

examine the character of their *purposes* in the light of a *social ideal*.

Our discussion of Kantian jurisprudence may have been somewhat restricted. It has indeed dwelt on the Kantian view of juristic problems in general rather than on the detailed construction which the Kantian jurists put upon the doctrine of Corporate Personality. But it would be an undue strain on the reader to follow out in full the ramifications of a jurisprudence whose very foundations have already been criticized. Yet it has been an important gain if our criticism of rationalistic jurisprudence has been sound, for it has led us from the 'frigid heights of pure thought' to the 'safe land of dry fact'. It has at least set aside the dualism of thought and fact, the ideal and the actual, which cannot serve as the basis of an empirical science, if indeed of any other. In place of the Kantian faith in the efficacy of an abstract logical dialectic, the trend of our criticism has led us to put our faith as jurists in the concrete world of fact, and to seek within it, and not apart from it, the key to its juristic interpretation.

With this discussion of neo-Kantian jurisprudence ends our discussion of theories which may be strictly called rationalistic. We cannot, however, pass on without examining a theory which, if it claims to have very different foundations from those of rationalistic jurisprudence, may yet, for our purposes, be best discussed in connexion with it. No doubt many philosophers would be indignant if we spoke of Hegelian thought as rationalistic, and their indignation would be justified. We do not propose for one moment to support such a view, so far as the fundamental principles of Hegelian idealism are concerned. But if the Hegelians aim at a concreteness which the neo-Kantians reject, in their political philosophy they nevertheless fail to realize that aim for two reasons. Firstly, they do not allow for the abstraction involved in the juristic concept of the state, and, secondly, they attempt to treat dialectically and philosophically that which is essentially practical and empirical. The result is that their theory of the state suffers from those very defects which we have observed in the theories of the rationalists. It will be more suitable for our present purpose and more convenient for the English reader to consider this theory as propounded by Bernard Bosanquet, its greatest English exponent. It will be of special interest for two reasons. Firstly, it claims to have overcome the dualistic separation of the ideal and the

actual, of law and society, which lies at the basis of Kantian jurisprudence. Secondly, it gives us a conception of state-absolutism to which our own conclusions are entirely opposed.

There is probably no theory which has received so many different interpretations and suffered so much from misunderstanding of its true meaning as the Hegelian theory of the state.[1] But this is not entirely the fault of its critics. The inherent difficulties of Hegel's language make his philosophy a happy hunting-ground for those who love the exercise of academic ingenuity. Nor have these difficulties been very much lessened by its English exponent. It is the uncertainty of Bosanquet's meaning when he speaks of the 'state' that makes it extremely difficult to discuss his theory of it. Sometimes he speaks of the state as an aspect of organized social life, as its outward organization,[2] and distinguishes between the juristic conception of freedom and its political conception.[3] At other times, and more usually, he identifies the state with the whole of society, speaking of it as 'the operative criticism of all institutions',[4] 'the fly-wheel of life',[5] 'society as a unit'.[6] And finally he increases the confusion by speaking of 'society and the state' while in no way implying any difference between them.[7] If, however, we consider his theory of the state in the light of his general philosophical principles which constitute its true preface, we cannot but conclude that he does intend the identification of the state with the whole of society. He prepares us for this when he praises the eighteenth century for its 'revival of a true philosophical meaning within the abstract terms of juristic tradition'.[8] It is his aim to produce a 'philosophical' theory of the state, and philosophical theory does not deal with abstractions, but treats of 'human life from the point of view of value and completeness'.[9] Philosophy, as the Hegelians never cease to remind us, is interested in nothing less than the whole of reality, and social philosophy in nothing less than the whole of social life complete in all its aspects. Bosanquet is therefore fundamentally in sympathy with the point of view which we are urging, that jurisprudence must have its foundations in a sound social philosophy, that the juristic concept must be fashioned with reference to the concrete philosophical meaning

[1] *Vide* remarks of Bosanquet in his *Philosophical Theory of the State*, pp. 247 ff.
[2] *Ibid.*, p. 7.
[3] *Ibid.*, pp. 136–7.
[4] *Ibid.*, p. 150.
[5] *Ibid.*, p. 152.
[6] *Ibid.*, p. 185.
[7] *Ibid.*, p. 182.
[8] *Ibid.*, pp. 12–13.
[9] *Ibid.*, p. 50.

of the facts which it construes. And this distinguishes the position which he takes up in regard to the problems of jurisprudence from that of Kelsen, who regards the world of juristic thought as an exclusive system of abstract norms. But if Bosanquet's aim is to be concrete, the means by which he proposes to introduce concreteness into the concepts of juristic thought lead him, on the one hand, to a confusion of the juristic concept with the philosophical concept, and, on the other hand, to a false appreciation of the philosophical meaning of social life.

To do full justice to Bosanquet's theory when viewed as a contribution to social philosophy in its broadest sense would require a careful consideration of its philosophical basis. It would be necessary to distinguish the Hegelian logic on which it rests from that of the Kantian philosophy. But this would be to go beyond the limits of our inquiries. We must therefore confine our attention to what the Philosophical Theory of the State can mean from a strictly juristic point of view. With this end in view we shall examine it only in respect of those two of its features which, as we have observed, make it specially interesting at this stage of our discussion.

Bosanquet starts from the paradox of self-government and falls back on Rousseau's theory of the general will as its only solution. This theory, according to Bosanquet's interpretation of it, rests upon the distinction between the *actual* will of the individual and his *real* will.[1] The actual will of the individual is the expression of his private life. It wills now one thing, now another, and thus contains what Hegelians call the defect of particularity. It cannot, therefore, go to the making of a society whose members are bound to each other by necessary relations. The best that could be done with such atomistic wills would be to treat them as having contracted with one another, but the difficulty would remain that there is no reason why their contracts should not be broken.

Bosanquet rightly holds that this view of the problem is *ab initio* mistaken and bound to prove fruitless if only because it does not take into consideration all the facts. He criticizes the individualistic theories which it produces as prima facie theories' or 'theories of the first look'.[2] They rest upon a first look at the social group, from which it appears as a collection of independent individuals. If, however, we proceed more thoroughly and ask

[1] *Vide* remarks of Bosanquet in his *Philosophical Theory of the State*, pp. 118 ff.
[2] *Ibid.*, p. 82.

what the will of the individual *really* is, we find that its definition must go beyond the limits of his particular individuality and include the society in which he lives. We discover that his actual will is not his real will. The former is what he exerts as a conscious individual from moment to moment, and it is incomplete and unsatisfying because in itself it is at the mercy of transitory wishes and wants and supported only by a very limited experience and knowledge. A full account of what he really wants but wills so incompletely at any moment requires a process of criticism and adjustment by which all the objects of his willing are brought into a rational shape. Such an account gives us not what he in point of fact wills as a finite individual but what he would be willing if he understood all the needs of his nature as a member of society. The real will of man is thus not his actual will but an *ideal* will. It is the result of a process of criticism and interpretation which he himself cannot effect, but which requires 'the whole labour of history and social logic'. Its essential meaning is just that it stamps man's actual will with the mark of incompleteness, and shows how that will points beyond itself to an ideal will, which is realized by nothing short of a plurality of individuals pursuing an organized social life. Thus a profounder investigation shows us that the 'first-look theories' neglect the fact of society, which is as much a fact for the political theorist as the individual. And indeed, for Bosanquet, it is a fact of far higher importance. He sees in society, with its laws, customs, and institutions, something more than the actual will of its members expresses or can express. It is the standing expression of their *ideal* will, their *real* will, their true general will.

Now this complex fabric of society which thus expresses the real will of the individual, Bosanquet identifies with the state, of which he speaks indifferently as 'the incarnation of the general or Real Will',[1] 'the guardian of a whole moral world',[2] 'an imperative necessity of man's nature as rational',[3] and 'society as a unit'.[4]

It is important to bear in mind that Bosanquet is not depicting an ideal state in the ordinary meaning of that expression. He is not concerned with the construction of a utopia. His object is 'to understand what a state *is*'.[5] He therefore means that the attributes which his theory gives to the state are really constitutive of it. So

[1] *Ibid.*, p. 281. [2] *Ibid.*, p. 325. [3] *Ibid.*, p. 261.
[4] *Ibid.*, p. 185. [5] *Ibid.*, p. 250 (the italics are mine).

when he speaks of the state as a 'moral person' he is not to be taken as meaning an imaginative fiction, such as the lawyer in England intends when he speaks of a body corporate as a person. The moral person of the state is as real for Bosanquet as the Absolute, which in Hegelian metaphysics signifies reality as a whole. It is, moreover, the only true reality for the social philosopher, for it is the only 'whole' which satisfies the demands of rational criticism for completeness and self-sufficiency. According to the Hegelian philosopher, the real is the rational.

But this is not all that Bosanquet has to say about the state. If it were, he would differ little from Kelsen. He goes further than the neo-Kantian by refusing to entertain the dualistic separation of form and content, of an ideal law expressed by a state-organization and an actual group of living individuals in whose empirical life that law is neither born nor realized in fact. He overcomes the dualism by holding that the formula—the real is the rational—is reversible. The rational is also the real. The last word of the Hegelian is thus not to identify the real with the ideal, but to identify the ideal with the actual. And, in accordance with this principle, Bosanquet holds that the moral person of the state is not merely an ideal conception but an actual fact realized in the concrete life of its citizens. 'Laws and institutions' (which are the content of the state) 'are only possible because man is already what they gradually make more and more explicit.'[1] What philosophic inquiry discovers is not an unattained, still less an unattainable, ideal, but a reality actual as well as ideal which, though it remains merely implicit in the ordinary course of social life, always underlies and governs that life. The moral person of the state is thus an actual reality.[2]

Now Bosanquet deduces from this that the state, far from being an instrument of oppression, is essential to the true self-realization and freedom of the individual. Since the will of the state expresses the real or ideal will of the individual, it is justified in exercising absolute power of constraint over him. By doing so it is not leading him into bondage but forcing him to be free.[3]

[1] *Vide* remarks of Bosanquet in his *Philosophical Theory of the State*, p. 122.

[2] 'We are dealing, in society and in the state, with an *ideal fact*.' *Ibid.*, p. 256.

[3] *Vide* Rousseau, *Contrat Social*, chs. vii and viii, Bk. I, '. . . whosoever shall refuse to obey the general will shall be constrained to do so by the whole body, which means nothing else than that he will be forced to be free.'

Accordingly, true political freedom is realized by complete submission to the authority of the state.

The philosophical or metaphysical theory of the state thus recalls with emphasis the 'sovereign' of Austinian jurisprudence. But from the jurist's point of view it is a much more dangerous theory than that of Austin. The latter was the invention of a practical lawyer who wanted a working hypothesis to guide him in interpreting the legal structure of a particular community. It resulted primarily from considerations of expediency. So far as its theoretical foundations were concerned, these were of the most superficial kind, and that is why the lawyers, who have had to apply it, have frequently admitted practices inconsistent with its logical implications. But the philosopher cannot countenance with equanimity the logical inconsistencies of the lawyer. The philosophical theory of the state leads us into the realm of metaphysical considerations where theory is absolute and allows no compromise with the illogicalities of practical life. Again, the Austinian theory, though it sketches an hierarchy of powers in which the sovereign or state is the highest, leaves this sovereign external to its subordinate powers over which it has absolute power of command. But the Hegelian blushes to witness such bad metaphysic. Things external to each other cannot make a unity. They must be related within a whole. They must be parts of a single system. Thus in Bosanquet's theory, the state includes and absorbs all other institutions,[1] as a system includes and absorbs its parts. It is an institution whose character can indeed be expressed, if at all, only in the language of Hegel. It is an Absolute.

Now if we appreciate what the Absolute means for Bosanquet we shall appreciate what he means by the state as a moral person and the conclusions he draws therefrom. The Absolute is for the Hegelian the same as the whole of Reality, and, because Reality is spiritual through and through, the Absolute is a Spirit. The difficulty is, however, hardly lessened until we see that the Hegelian means by spirit the same as he means by value, for this term is more negotiable for the non-Hegelian. Accordingly, it is as a *value* that Bosanquet studies and defines the state.

[1] 'The State, as thus conceived, is not merely the political fabric . . . But it includes the entire hierarchy of institutions by which life is determined, from the family to the trade, and from the trade to the Church and the University.' *Philosophical Theory of the State*, p. 150.

Here lies the basic error of the philosophical theory. Value is an abstract notion, and to consider the nature of social and juridical organization in terms of it alone, is to place ourselves out of touch with the concrete realities of life. Bosanquet would, of course, object strongly to our calling the state *qua* value an abstraction. For the Hegelian, the concrete is the universal and the universal is the comprehensive. The state, by virtue of its comprehensiveness, comprehends the totality of meaning in social life, and is therefore the most concrete—strictly, we should, of course, say the only concrete—reality conceivable to the social philosopher. But Bosanquet, in common with Neo-Kantians, is the victim of a failure to appreciate the abstraction involved in the process of thought by which he has reached the concept of the comprehensive state-organization. He does not realize that his thought has grown more comprehensive at the price of becoming more abstract. When, therefore, we speak of value, and thereby mean to comprehend an entire reality, we have really abstracted from that reality. To identify the value which a reality has for thought, which has become comprehensive by virtue of becoming more abstract, with the reality itself is to identify the abstract with the concrete. And this is the logical error underlying the Philosophical Theory of the State. It explains why that theory gives the state an absolute power over its members and maintains that in an absolute submission to its authority they are following the only true path to political freedom.

In Bosanquet's theory, the individual disappears in the all-absorbing grasp of the state. How pale and anaemic is his frail self before that 'Leviathan' which is the guardian of his whole moral being!' How little seem even the functions of universities and churches when contrasted with the function of that institution which is 'the operative criticism of all institutions', 'the fly-wheel of our life'! Why then is it that Bosanquet, who is so taken up with the problems of ethics, with the problems of self-realization and of freedom, is content to support a theory of state-absolutism which crushes the individuality of man and reduces him to a cog in the social machine? We shall go straight to the root cause of the matter. Great as were the minds of Hegel and his followers, they were not immune from the dangers of a reflective life, the dangers which the modern psychologist has in mind when he speaks of the 'malady of

[1] *Vide* remarks of Bosanquet in his *Philosophical Theory of the State*, p. 325.

thought'. They frequently equated life with the constructions of an abstract thought; and were prone to hold that the more comprehensive their thought grew, the more concrete was the reality which it conveyed. Under cover of the magic sound of 'value', they would lose touch with the realities of experience and enter a sphere of abstract conceptions which they then equated with reality.

This is the dialectic which leads Bosanquet to identify the actual and real will of the individual. We have observed that he ends, not with identifying the real will with the ideal will, but with identifying the ideal will with the actual will. Obviously there is a *petitio principii* somewhere and it is not difficult to discover. It lies in the fact that as soon as Bosanquet draws the distinction between the actual will and the real will he no longer thinks of the will as a conative force, as a psychological phenomenon. Will has come to mean for him *value*, and since value is identical with reality, there can be but one will. It must be actual as well as ideal, otherwise we have a dualism which the Hegelian monist will not allow. Hence Bosanquet says that 'we are dealing, in society, and the state, with an *ideal fact*'.[1] It follows that the distinction between the ideal and the actual is emptied of all its meaning, and so the very problems of moral and political philosophy become unreal.

It is instructive to consider how similar is the view of the Hegelian to that of the positivist or pragmatist on this point. The positivist or pragmatist identifies the actual with the real.[2] For him there is only one reality and that is actual. Consequently, if we may introduce into his system a word which cannot properly find a place in it, we may say that he identifies the actual with the ideal. The Hegelian working from the opposite direction comes to the same conclusion. Whatever is ideal (which means rational), is for him actual. This explains why Bosanquet rests content with a theory of state-absolutism. He no longer thinks in terms of living individuals in whose lives the question of freedom only arises when there is a clash of wills.[3] He thinks in terms of abstract value, of rational form, of intellectual synthesis. His state is an abstract conception and so are the data which it synthesizes. That is why Bosanquet identifies with any actual state his state, in which they are incor-

[1] *Ibid.*, p. 256.
[2] *Vide infra*, part ii, ch. i.
[3] *Vide* Hobhouse, *The Metaphysical Theory of the State*, p. 39.

porated, and to which are subordinated all other institutions, in the same manner that the parts are incorporated in and subordinated to a logical system.

We may therefore well wonder what Bosanquet meant when he wrote: 'If there is anything satisfactory in the conception of self-government, every interpretation of it is at once condemned which does not give the fullest force to both terms of the paradox, at the same time that it exhibits their reconciliation . . . We must start from an actual self, which is capable of rebelling against law and government; and from an actual "government", which is capable of tyrannizing over the individual self.'[1] The overwhelming emphasis of his own theory is upon the power of government vested in the state. Before this power the individual shrinks into his mortal coil with but one duty and but one right, to obey the state and to hope for its moral guardianship! The theory is, as we have said, far more dangerous from the jurist's point of view than the Austinian theory of sovereignty, for it has its origin not in juristic but in moral considerations. It grants to state-absolutism the virtue of moral truth.[2] But the citizens of the modern state, who are so vehemently opposed to the idea that the power of the state is unlimited and extends to every nook and corner of the body politic—is it possible that they will find consolation and reason for faith in the theory that the state expresses their real selves?[3] We can but answer that this will be the case only if the state of which the theory speaks is something quite different from the state of which the lawyer and the jurist speak. But we have seen that this is not so, that Bosanquet is speaking of the state which actually appears on the scene of our political life and expresses itself through Parliament, the courts of law, and other agencies of government. Accordingly, it cannot escape those objections which the teachings of legal experience and the perspicacity of juristic criticism have brought against other theories of state-absolutism.

The Philosophical Theory of the State, of course, implies the Concession Theory in regard to the rights of corporate bodies within the state. But on this aspect of any theory of state-absolutism we have dwelt enough. A more vital objection to be raised

[1] *Vide* Hobhouse, *The Metaphysical Theory of the State*, p. 77.

[2] Cf. Croce, *The Philosophy of the Practical* (Engl. Transl.), pp. 431–2.

[3] '. . . the identification of the state with the Real Will of the Individual . . .' *Ibid.*, p. 154.

against Bosanquet's theory concerns the peculiar support it gives to the essential point of the Fiction Theory. As a result of the view it takes of the state as something over and above its individual members, as a supra-individual reality which transcends its members, the state takes on the character of the *persona ficta* which is something other than its members. This is indeed the ruling conception of the Hegelian political philosophy which views social evolution not as the product of a plurality of co-ordinating minds but as the expansion of a single idea or spirit into its differences. In the words of Hegel, 'the state is the divine idea as it exists on earth'.[1] It is 'the movement of God in the world', and its history is the history of 'God coming to be'. Social evolution is a drama enacted by the one Absolute realizing itself through the state, and we are but the spectators of its supra-human works. This is but the inevitable conclusion of any political theory which considers social life in terms of objective value only, and neglects its subjective aspect as the expression of individual effort on the ground that this is but an '*appearance*' which vanishes before the searching critique of metaphysical inquiry.

But the chief difficulty with which Bosanquet's theory would have to contend if it ever entered the arena of applied jurisprudence would arise in connexion with the maintenance of international law. It would have to explain how there can be more than one state, since the state is the Absolute and the Absolute includes all things real. Yet Bosanquet identifies the state with the nation-state and thus clearly means to admit the existence of many states.[2] Again, he would have to explain how many states, each of which is an Absolute, can have any relations with one another. But not even the subtleties of Hegelian logic can overcome these difficulties.[3]

It is, then, on two grounds that the jurist must reject the

[1] Hegel, *Philosophie der Geschichte ; Philosophie des Rechts*, p. 349.

[2] 'The Nation-State . . . is the widest organization which has the common experience necessary to found a common life.' *Ibid.*, pp. 320 and ff.

[3] *Vide* Hegel, *Grundlinien der Philosophie des Rechts*. In the *Zusatz* to par. 330 (p. 370), Hegel says that states are 'not private persons but entirely independent totalities' ('Staaten sind keine Privatpersonen, sondern *vollkommen selbstständige Totalitäten an sich* . . .'). Yet he goes on to say in the very next paragraph, par. 331 (p. 267), that states must have relations with other states ('So wenig der Einzelne eine wirkliche Person ist ohne Relation zu anderen Personen, so wenig ist der Staat ein wirkliches Individuum ohne *Verhältniss zu anderen Staaten*'). The italics are mine.

Philosophical Theory of the State. Firstly, it confuses ideal conceptions with actual facts. Secondly, it introduces into the field of juristic theory metaphysical issues which are irrelevant to it.

These two errors of Bosanquet's political philosophy are bound up with each other. They both have their origin in the abstract notion of individuality with which Bosanquet works. He applies the categories of pure logic to the will, with the result that will ceases to mean the creative power behind human social life, and comes to mean an abstract value. In other words, the psychological aspect of the will is excluded from the province of political theory, and all that is left is the rational form which its purpose has from an intellectualistic point of view. This is the real meaning and effect of Bosanquet's statement that as regards social phenomena the question of political philosophy and jurisprudence 'is of their nature or tendency, not of their centre of origin'.[1] If this were true, we should have to deny that law must have social sanctions, and with this denial we should surely deny the only political faith that has ever moved men to sacrifice themselves in the interests of political idealism. There is no freedom in a community which is ruled by laws which are not in some real sense of its own making. The true foundations of the authority which the state exercises can ultimately lie only in the individual wills of its members. Where a state does not so receive its authority, we must face the facts fairly and squarely. It is no use shutting our eyes and with the aid of an unearthly metaphysic believing that the state is here but exercising the real will of its subjects, of which they are, alas! unhappily ignorant. We must here admit frankly the existence of injustice and political bondage and try as best we can to remedy the evil.

Jurisprudence cannot ignore the psychological character of society. It must take into account the plurality of its centres of volition, and the antagonism which can and does appear in their interaction.[2] Bosanquet does not solve the problems arising from the clash of wills which is of the essence of social life. He merely sets them aside. His political philosophy does not fulfil the promise contained in his assertion that 'we must start from an actual self which is capable of rebelling against law and government; and from an actual "government" which is capable of tyranny over the indi-

[1] *Vide* Hegel, *Grundlinien der Philosophie des Rechts*, p. 183.

[2] 'Social evolution goes forward in centres which if not wholly unrelated are by no means indissolubly connected.' Hobhouse, *Social Evolution*, p. 334.

vidual self'.[1] It sacrifices the former and makes a god of the latter. No better criticism of the Philosophical Theory of the State can be adduced than that contained in a profound statement which Bosanquet himself makes. 'To leave the responsibility as freely as possible where it has been assumed is the best that law can do, and appeals to a spring of energy deeper than compulsion can reach.'[2] If we press this statement Bosanquet's theory of the state collapses; for it admits the externality of the state to those associations which come within its legal jurisdiction. It implies that the corporate life of these associations is not something derivative from the will of the state but born of a life-force inherent in them. It denies, in fact, that the state is their 'operative criticism' as a 'moral guardian' and clearly indicates that its authority is rather such as is compatible with a reliance on coercive methods of ensuring obedience. In short, it means that society and state are not the same. The state is not the only association there is, and society contains a complex of associative life which is very largely outside the scope of the state's jurisdiction.

Our discussion of the Philosophical Theory is far from exhaustive and leaves many gaps for the objections of its devotees.[3] But it is not so much the theory itself that we have sought to criticize as the method that has given rise to it, and this is essentially the rationalistic method of Kantian jurisprudence. This statement is far from orthodox. As we have said, philosophers will object that it is a long way from Kant, and especially from the neo-Kantians, to Hegel, and that they cannot be classified together as rationalists. This is clearly true for the philosopher. But the jurist may be pardoned for not following the philosopher all the way in his metaphysical speculation. It is not with the metaphysics of Kant and Hegel that he is concerned, but only with what they have had to say about the problems of jurisprudence. And in this regard he is justified in classing them together as *rationalists*. For, whatever differences they may present in their systems of logic and in their aims as jurists, in their systems of jurisprudence they adopt the

[1] *Ibid.*, p. 77. [2] *Ibid.*, p. 68.

[3] Other expositions of the Hegelian theory of the state besides those of Hegel and Bosanquet, may be studied in Green, *Principles of Political Obligation*, and Lord, *Principles of Politics*. Critical discussions of the theory are to be found in almost every modern political and sociological work. The following works are specially valuable on the point: Hobhouse, *The Metaphysical Theory of the State*; Maciver, *Community*; Heath, *Personality*.

same method. Throughout their discussion of juristic problems they both attempt to treat philosophically or dialectically that which is contingent and empirical.[1] They neglect the abstraction involved in all juristic concepts and their practical character which distinguishes them from philosophical concepts. The inevitable result is a distortion of facts, and the construction of theories which have no place in or value for applied jurisprudence.

Our criticism of rationalistic jurisprudence has been in the main destructive. We have hardly dwelt on the great truth which it has emphasized as has no other jurisprudence. This is the truth that a purely empirical point of view cannot lead to the solution of juristic problems. It is in its insistence on the impotence of a pure empiricism to explain the nature of law that the permanent contribution of rationalistic jurisprudence lies. To appreciate the importance of this contribution, we must see what happens if we attempt to construct a jurisprudence on a purely empirical or pragmatic basis. For this purpose we shall proceed to examine the foundations and conclusions of the realistic jurisprudence of M. Léon Duguit.

[1] Croce, *Philosophy of the Practical*, pp. 574–5, and Croce, *What is Living and what is Dead in the Philosophy of Hegel*.

PART II
SOCIOLOGICAL THEORIES

I

PRAGMATIC JURISPRUDENCE : LÉON DUGUIT

Sociological jurisprudence — Duguit's realistic method — Gény's criticism — Duguit and Comte — Duguit and Bergson — pragmatism — Duguit's criticism of conception of subjective right — his hypothesis of social interdependence — his theory of *droit objectif* — his theory of social reaction — criticisms — Duguit's reply — criticism of his theory of *droit objectif* — conflicting tendencies in Duguit's thought — his criticism of conception of corporate personality — his theory of associations — his inconsistency as a realist — his rationalism — introduces conception of natural law — his substitution of co-ordination for subordination — difficulties which Duguit's theory of associations cannot meet — his conception of law abstract — conflict between his realism and his rationalism — his neglect of 'will' as element in juridical situation — his failure to connect actual and ideal aspects of law — normative character of social facts — Duguit's syndicalism — criticism — Duguit's materialism — Hobbes — Duguit's neglect of individual initiative — value of conception of subjective right — and of corporate personality — Duguit's treatment of associations inadequate — his dogmatic empiricism — his theories of function and of organ — summary.

WHEN August Comte first suggested the treatment of social facts as natural facts, he laid the foundations of a new point of view for the study of social problems. The science of sociology which it produced has scarcely passed the stage of infancy. Its province and methods are still matters of keen debate. But on two points all sociologists are agreed. There can be a science of society, and it is an empirical science. The complex life of society develops or decays in accordance with certain general principles, and these can be discovered only by investigating social facts and not by *a priori* reasoning. Thus sociologists are united in their opposition to the rationalistic treatment of social problems; and since the problem of jurisprudence is nothing if not social, they have done much to discredit the rationalistic theories in which orthodox jurisprudence abounds. But they are far from unanimous in their solutions of juristic problems. Sociological jurisprudence offers rather an avenue of approach for the jurist than a definite solution of his problem, and it is desirable for the present that it should signify no more.

Among those who acknowledge themselves the intellectual descendants of Comte no one stands out in greater relief as a jurist than M. Léon Duguit. His theories serve as the focus of current juridical debate. Not only the lucidity of his writings and his

exhaustive consideration of juristic problems but also his keen observation of current legal movements have given him a position of eminence among modern jurists. But the dividing line between fame and notoriety is thin, and M. Duguit has invited the latter by the boldness of his criticisms and the startling simplicity of his method. Even as William James sought to uproot the foundations of traditional philosophy, so M. Duguit is threatening some of the most cherished conceptions of traditional jurisprudence. Accordingly his work demands our most careful consideration.

At the beginning of his chief treatise on constitutional law, Duguit explains that he wishes to apply to the study of juristic problems 'a method truly and exclusively realistic'.[1] Fortunately the difficulty which so often arises when philosophers call themselves realists is absent in Duguit's case. Logically, his realism denotes a crude empiricism, a belief that knowledge results from the simple observation of facts which present themselves to our senses. But Duguit does not object to being called a naïve realist. For philosophers or metaphysicians he appears to have a singular contempt,[2] and he wishes to exclude their pernicious influence from the province of jurisprudence. The grounds of their objection to his method are, for him, just its merits. He is determined to be a thoroughgoing empiricist, and no mere logical disquisition will shake his faith. If, therefore, we consider his method inadequate, it is by its results that we shall have to prove it so. But before we proceed to examine Duguit's theories, it is essential that we understand clearly the point of view which prompted them.

M. Gény has pointed out, as the great defect of Duguit's work, that it does not give an explicit account of the metaphysic which it implies.[3] In his penetrating analysis he shows how Duguit is always working with metaphysical conceptions in spite of his explicit repudiation of all metaphysics. This is a point on which in our final criticism we will have to insist most strongly. But to do so at the beginning of our inquiry into Duguit's jurisprudence would be to miss the very pith of his general point of view. His almost deliberate refusal to recognize the metaphysic which critics such as Gény have discovered underlying his theories implies a further metaphysic which is the real driving force of his thought. Ulti-

[1] *Traité de Droit Constitutionnel* (2nd ed.), vol. i, p. 3.
[2] *Ibid.*, vol. i, p. 3.
[3] Gény, *Science et Méthode en droit privé positif*, part ii, p. 270.

mately it implies a thorough scepticism in regard to the possibility of rationalizing the world of social experience, of penetrating to the secrets of its inner structure by means of logical thought. But it is not finally true to call Duguit a pure agnostic as Gény does.[1] He does not deny the possibility of a jurisprudence. He merely offers us a new jurisprudence based upon certain rather vague philosophical conceptions as to the nature of truth which differ from those which Gény, and we ourselves in this work, would support. It is essential that these should be clearly understood, for they explain, if they do not justify, Duguit's unyielding hostility to metaphysics.

Duguit is the faithful disciple of Comte. He maintains rigidly the two great innovations which Comte introduced into social science. The latter sought to do away with the conception of substance, which he considered as unscientific. He proposed to treat society in the same way as the physicist treats the material world.[2] The physicist does not inquire into the inherent nature of physical things. He does not ask *why* things happen as they do; he asks *how* they happen. He views physical things merely in their external interaction, and is interested only in the various physical relations to which that interaction gives rise. Comte likewise wished to treat society as a collection of individual human beings interacting externally. The intrinsic nature of these individuals he considered as outside the ken of the scientist, since it does not admit of empirical observation. Sociology was to be an empirical science which examined social relations in terms of cause and effect. Nor was it to be confused with psychology, which inquires into the psychic relations which persist within the individual mind.[3] Sociology was to be a science with its own subject-matter, social relations. The sociologist would be concerned with these relations only, and *quâ* scientist would avoid inquiring into the intrinsic nature of the substances among whom they exist. Thus Comte was the arch-opponent of the conception of substance and the apostle of the scientific—as he called it—*positive philosophy* which maintains that the category of causal relation is the one and only key to the true understanding of social life. He bids us examine society in terms of cause and effect and define it as consisting of

[1] *Ibid.*, part ii, p. 197.

[2] Comte, *Cours de Philosophie Positive*, tome iv, 46e Leçon.

[3] Comte treated psychology as part of biology, which, in his hierarchy of the sciences, comes a stage lower than sociology. *Ibid.*, tome iii, 45e Leçon.

such and such *relations* between individuals. Consequently he is unequivocally opposed to using the conception of personality in our scientific judgements. He views the conception of group personality as nothing but a myth, for to be consistent he can see in society nothing but so many individuals interacting externally who yet remain separate entities throughout this interaction. The application of the conception of personality to a social group he would consider the result of unscientific thought. He would have us concentrate on actual social facts and examine them by means of the category of cause and effect, and so realize that what we have considered as a person is nothing but a complex of causal relations between a plurality of individuals.[1]

In all this Duguit follows Comte. He is likewise the arch-opponent—in the field of jurisprudence—of the conceptions of substance and corporate personality.[2] Yet it is a little strange to speak of a Comtian jurisprudence, for Comte himself did not give jurisprudence a separate place in his hierarchy of sciences. He skipped it in passing from biology to sociology. We shall therefore have to consider whether Duguit goes further than Comte in the separate and specialized treatment which he gives to law. But this we must postpone until we have examined his actual treatment of juristic problems. It is enough here to observe that, like Comte, he seeks to pursue a method throughout empirical and analytic, and that his conception of society is consequently essentially individualistic.

Unfortunately Duguit makes no reference in his writings to a philosopher with whom he has much in common. M. Henri Bergson's philosophical realism[3] would in its essentials form a fitting preface to Duguit's realistic and positive jurisprudence. Its destructive criticism of reason as a possible way of understanding the nature of things real, and its consequent insistence on immediate intuition or unreflective life as the only path to truth, is essentially at one with Duguit's opposition to the use of metaphysical conceptions in the solution of social problems and his

[1] It is, of course, illogical for the Comtian to speak of individual personality. *Vide infra.*

[2] *Manuel de Droit Constitutionnel* (3rd ed.), p. 28. Duguit here says that the conception of the state as a person is a juristic construction based upon the old, valueless scholastic conception of substance and attribute, and is therefore extra-scientific.

[3] *L'Évolution Créatrice.*

consequent insistence on the living social fact as the entire social reality, and as such patent to our simple observation. Duguit of course differs from Bergson in some respects. Bergson's 'intuition' is born of his experience as an artist. His philosophy is that of the artist *par excellence*. Duguit's temperament is of a different order. In strange contrast to his professed empiricism it leads him into long theoretical disquisitions which suggest an essentially critical mind. But so long as we compare the two writers on their common ground of *pragmatism*, we can observe an illuminating likeness.

Duguit would in all probability admit the pragmatic antithesis of life and thought, fact and idea, for it is just the metaphysic implied in his view that a social science can be got only from the simple observation of social facts and without the use of those abstract conceptions which are merely metaphysical and thus devoid of reality. But it is when couched in the terms of everyday language that the definition of pragmatism is most significant; for it is really in the immediate experience of our everyday life that the pragmatist sees the type of that communion with the real which, alone, the consistent realist can admit. The pragmatic point of view which Duguit upholds is essentially that of the so-called 'practical' man who avoids theories and knows a fact when he sees it. The real thing is that which exists, the social fact, and not your idea about what it should be. In other words, Duguit's mind moves within a fatalistic universe, a universe of solid facts which it is our business to accept, if only because we cannot do otherwise. It is no use trying to change them by contrasting them with an ideal order which they should manifest. The best that we can do, if we wish to remain within the province of the real, the universe of solid fact, is to accommodate ourselves to it. The wisdom of the scientist is the recognition of fact and obedience to it, not its criticism in the light of ideal conceptions. The latter is but the play of mythical fancy.

Now, in spite of the objections of logicians, we will admit for the moment the possibility of this purely empirical point of view. Though it may be a gross fiction and a popular excuse for superficial thought, yet it is a point of view which governs but too often the efforts of legislators and lawyers. It will certainly have a definite significance for those who have met and understood, perhaps even suffered from the popular antithesis of the 'theoretical' and the 'practical' man. Again, no one has been subjected to

cheaper and more unintelligent criticism than the pragmatist. To begin by pointing out logical inconsistencies in his thought is to miss the point. He issues a challenge to those who lay such emphasis on logical consistency, and proposes to pin his faith on obedience to the demands of practical expediency. Lastly, every one of us is somehow influenced by and dependent upon the actual social movements going on around him. This dependence may be so strong that it may lead us to conclusions which are not strictly the results of applying our professed methods of juristic inquiry. Both Duguit and Krabbe have the same theory of social reaction, but their methods are different.[1] To shut our eyes to their conclusions because they do not apply their methods with perfect consistency is not the way to appreciate most fully the value of their work. We will therefore try to see as far as we can with Duguit's eyes, in order that we may appreciate his contribution to modern jurisprudence, and at the same time the products of a common attitude to juristic problems.

Duguit's realistic method leads him in the first place to discard two age-old conceptions of jurisprudence, the conception of subjective right and the conception of corporate personality.

The conception of subjective right, we are told, stands condemned in that it implies 'the power of a will to impose itself *as such* on other wills'.[2] In order to determine who possesses this power we should require to know the intimate nature of the human will.[3] But this is not open to our observation and so cannot be brought to our aid in the juristic construction of social life. In place of the subjectivist conception of right, which raises insoluble problems, Duguit therefore puts his objectivist conception of law. In it we have clear evidence of his debt to modern sociology, particularly to that of M. Durkheim.

This conception of subjective right which Duguit discards is that of the eighteenth-century theory of natural rights, which in 1789 received its classic expression in the famous Declaration of Rights. Duguit opposes its notion of the individual with original and inherent rights, and maintains that only *within* the social group are to be found those relations with which the jurist is concerned. But it is no organic theory of society that Duguit

[1] For Krabbe's theory, *vide infra*, part iii, ch. iii.

[2] *Traité de Droit Constitutionnel*, vol. i, pp. 3 and 127. The italics are mine.

[3] *Ibid.*, vol. i, p. 7.

propounds. His conception of society is atomic. If he emphasizes the social aspect of law, he never misses an opportunity of insisting on the exclusive integrity of the individual will and consciousness. Society is for him simply a collection of individuals. True, he asserts that the reason why they live together is that they are by nature social and cannot live in isolation.[1] And this, he maintains, is an observable fact and no metaphysical notion. But in truth he has gone beyond the limits of his realistic method. All that we get by simple observation is the obvious fact of a plurality of individuals actually living together. To define the individual as by nature social is to tread upon the path of the generic universal, which is properly outside the recognition of the pragmatist. But this is an inconsistency worth overlooking in order to gain the more positive results of Duguit's jurisprudence. Duguit does not really seek anything more than a 'working hypothesis', and the test of its adequacy is to be its expediency and not its logical consistency.[2] For the pragmatist, it is important to remember, truth is that which works, and Duguit finds that his hypothesis of social interdependence works; that is, it satisfies the requirements of the jurist.

Now this solidarity, as Duguit terms the fact of social interdependence,[3] has its own laws, and these the jurist must discover. This again is merely a matter of observation and not of intellectual creation. 'There is nothing real except the observable, and everything observable is real.'[4] The jurist will find the reality which he is seeking so long as he merely observes how the solidarity of society actually manifests itself. Jurisprudence is thus an experimental science. Nor are its experiments other than simple, for the criterion with which it works is the simple one that law is law by virtue of its social sanction. The legality of any rule of conduct depends upon whether it is acceptable to the majority of those individuals to whom it is addressed. If a rule has this sanction, if it is actually approved and respected by the larger part of society, then it is what Duguit calls *objective law* (*droit objectif*).

It is important to understand precisely what Duguit means by

[1] *Ibid.*, vol. i, pp. 11–12, and p. 22.

[2] Thus Duguit is satisfied with his hypothesis of 'social interdependence', though, as he admits, it is open to criticism. *Law in the Modern State* (Engl. transl. by Laski), p. 43.

[3] *Traité de Droit Constitutionnel*, vol. i, pp. 22–3.

[4] *Ibid.*, vol. i, p. 329.

the objectivity of law. He does not mean with Kant that it is objective in so far as it is logically necessary. Duguit's thought is guided by the pressure of simple facts and not by the requirements of logical consistency. Thus objectivity means for him actuality or, to borrow a word from German philosophy, factivity (*Faktivität*). Law is valid if it is objective, and it is objective if it actually enjoys support from the majority of that society to which it is addressed. Let us apply only this objective law—what we more loosely call the law of public opinion—and we shall ensure good order in the life of society, for law will then have the greater force in society on its side. This emphasis on the extra-legal or social sanction of law constitutes the most important feature of Duguit's jurisprudence. But, unfortunately, he has nothing more to say, as a realistic jurist, about the foundations of law.[1] The presence or absence of the social sanction is in itself the criterion of the presence or absence of legal obligation. And this is the inevitable conclusion to which the realistic or pragmatic point of view must lead us. MM. Esmein[2] and Hauriou[3] have clearly shown that it simply makes force the basis of law.[4] Duguit, however, refuses to consider this an objection. Apparently it simply states what, in his view, we must accept as the necessary conclusion of realistic jurisprudence.[5] And it is only fair to bear in mind, at this point, the general pragmatic philosophy which prompts Duguit's thought. A knowledge of what is real is not to be got by the efforts of metaphysical thought. It is the reward of active life. In making public opinion the register of law Duguit, therefore, relies on the immediate—we may say intuitive—judgement of each and all men as the only sure guide to that juridical organization which is true and real for them. We must, therefore, accept his conclusion and see where it leads us. The truth is that it revives in a more dangerous form the evils of that *droit subjectif* to which he is so strongly opposed.

[1] This is true; that is to say, so long as Duguit remains consistent with his realistic point of view. But cf. *infra*, pp. 86 ff.

[2] Esmein, *Droit Constitutionnel* (7th ed.), vol. i, pp. 42 seq., esp. p. 45.

[3] Hauriou, *Précis de Droit Administratif* (10th ed.), p. 22, n. 1.

[4] In his *Manuel de Droit Constitutionnel* (3rd ed. 1918), p. 25, Duguit says that the state is founded on force. But he does not accept Ihering's definition of law as the 'politics of force' (*Politik der Gewalt*). He maintains that this force is legitimate only when it conforms to the law. But the law is, for Duguit, those relations which have the greatest force on their side. Thus Duguit is here arguing in a circle.

[5] *Traité de Droit Constitutionnel*, vol. ii, pp. 84–6.

By discarding the conception of subjective right, Duguit believes he has got rid of that inequality of wills by which some are made the lords and others the slaves of society. By subjecting the rulers as well as the ruled to a single objective law he does away with the conception of sovereignty and the subjective right to command with which it invests the rulers. But in truth he has only provided a new formula without destroying the defects of the old. For what does his theory of *droit objectif* mean but the power of a majority of wills *as such* to impose itself on a minority of wills *as such*? The theory of natural right and its complementary theory of the social contract saw the power to make and enforce the law as the subjective right of the ruler. Duguit's theory leaves this power in the hands of no single individual but of the majority of individuals in a society.

These two theories, so very different, have one important feature in common. They are both fundamentally individualistic. The theory of natural rights contemplates a number of independent individuals with inherent rights contracting to form a new and distinct subject, the state, which functions as a sovereign person in relation to its subjects. For Duguit, society is a plurality of individuals who stand in certain social relations to one another, but remain distinct units and give rise to no new subject besides their several selves. These social relations have the character of law in so far as the majority of individuals approve of them. The minority will simply have to bow before the fact of superior force. In place of the power of one will to impose itself *as such* on other wills, we have the power of a majority of wills to impose itself *as such* on a minority. True, Duguit does not imply any metaphysical notion of subjective right. But the important point is that the old formula still applies, and the reason for this is that *Duguit's theory leaves the exercise of power still a purely arbitrary matter*. If there is any important difference between the two theories, it is that in Duguit's theory 'power' is more identified with force. He admits—indeed he insists—that this power does not only signify material force, but includes elements which may be of a moral and even religious order, according to the particular country and the period under investigation.[1] But the fact remains, and Duguit admits it frankly, that he does not dis-

[1] *Ibid.*, vol. ii, p. 85.

tinguish between force and political power or authority.[1] Or, to render this distinction more significant, Duguit does not admit the distinction between the *fact* of superior material force and the *argument* of political power. To this point we shall return later.[2] It is sufficient here to observe that it justifies the above criticism of Duguit's theory of objective law.

Yet in spite of these criticisms, it is well to disengage and appreciate the general idea which here underlies and prompts Duguit's thought, that law should reflect the actual condition of social intercourse. He denies law—as all pragmatists must—that normative character in virtue of which it expresses a synthesis of social life, which is not a photographic account of social facts but an ideal construction of them. The Kantians saw that this ideality of the law was essential to its obligatory character; but they erred in making it depend upon too formal considerations. Duguit supplies the corrective for their rationalistic jurisprudence when he says 'a statute compels obedience not because it is a command, but because it formulates a rule of law which is itself the expression of social facts'.[3] The criterion of law, that is, lies not merely in its form but in its content, and this is the criticism which we brought against the theories of Stammler and Kelsen. But Duguit's own appreciation of this content is totally inadequate. His realistic method treats law purely in terms of its social sanction. The foundation of its obligatory character is simply the superior social force which will prevent its violation.

This exclusive emphasis on the social sanction of law gives Duguit's jurisprudence a peculiar turn. Though he makes the basis of law ultimately nothing but the individual will, or, more strictly, the majority of individual wills—a view which leads him to plead for universal and proportional representation—yet, when the machinery of his legal system is set in motion, the individual suffers a curious change of fortune. He appears as having only duties to perform, never rights to exercise.[4] His position as member of a juridical organization requires his obedience to certain laws which are necessary for the maintenance of social solidarity,

[1] *Ibid.*, vol. ii, p. 85. This is his reply to Hauriou's criticism.

[2] *Vide infra*, p. 96.

[3] *Law in the Modern State*, p. 265. Cf. *Traité de Droit Constitutionnel*, vol. i, p. 88: 'Obedience is not owed to the rule of law (*loi*) as such, but only to the rule of law expressing or carrying out a juridical *norm* (*norme juridique*).'

[4] *Traité de Droit Constitutionnel*, vol. i, pp. 200–3.

and the test of their necessity is the judgement of public opinion. But it is not Duguit's wish to support any tyrannous majority rule in which the individual is sacrificed on the altar of social efficiency, and so he takes pains to emphasize that these rules of law, which merely impose duties and admit no rights, do not in any way affect the substance of the will. They merely forbid the individual to perform certain acts and impose others on him. They affect him only externally.[1] A curious apology for Duguit to make! To excuse the apparent defects of his system he must needs refer beyond the strict limits of his 'point de vue purement realiste'.

This evident conflict between the demands of his conception of solidarity and his desire to champion the individual against the tyranny of extreme socialization Duguit does not settle. His own theory of objective law, as we have shown, does not overcome the difficulties of that conception of subjective right which he criticizes so strongly. Like all individualistic theories it ends by sacrificing the individual while pretending to save him. This, we propose to show, is further evident in his denial of the doctrine of corporate personality. Yet Duguit actually denies that he is an individualist.[2] He recognizes only the social individual.[3] But we have observed that this means no more than that the individual is subjected to certain rules of social conduct which he dare not violate. It does not imply the existence of any social reality including, but distinct from, each and all individuals and conceivable analogously as a person. There is only one subject, the individual human being.[4] Society is merely a complex of relations between individuals. To hypostasize this complex is merely misleading and invites all the insoluble difficulties which, Duguit thinks, attend the conception of corporate personality. Thus he denies the truth or value of the conception of sovereignty, which he considers unscientific. His main contention against it is that laws are not the creation of any person or persons endowed with the inherent right to make them, but are born in and through the social life of men. They merely *declare* explicitly the social relations which actually persist among the majority of men in society and give to their collective life that unity of interdependence which Duguit calls solidarity. Now, we do not dispute the social character of laws. We do not deny that

[1] *Ibid.*, vol. i, pp. 18, 20, 232 and 337.
[2] *Ibid.*, vol. i, p. 112.
[3] *Ibid.*, vol. i, p. 120.
[4] It is to be noted that Duguit retains the notion of 'subject'.

laws are and cannot but be the expressions of that solidarity which is being progressively realized from moment to moment in the life of society. But what we do deny is that Duguit's facile sociological conception and simple realistic method can appreciate the true character of that solidarity.

Duguit's objection to the conception of corporate personality is simply the logical outcome of his individualistic view of society. The only real will is the individual's will, and, therefore, to the individual alone can the law address itself. The conception of corporate personality, however, attributes to the collectivity as a whole a will distinct from the individual wills of its constituent members. This the realist may not admit, for 'what one sees, what is established, are manifestations of individual wills'.[1] Thus Duguit discards the conception of corporate responsibility. Responsibility can be attributed only to the individual, and it is in terms of such individual responsibility that Duguit proposes to treat juridically the internal and external relations of any group. The theory of state-sovereignty, of course, becomes impossible, and with it disappears that distinction between a public law determining the relations of the sovereign state to its members and a private law determining the relations between private individuals.[2] Such a division of the law Duguit considers unwarranted and dangerous in that it makes possible the arbitrary exercise of authority, which he believes his own theory does not allow.

Now, in Duguit's own treatment of those problems, for whose solution he objects to using the conception of corporate personality, we have two distinct points of view. Up to a point he remains true to his realistic method. But the ulterior developments of his jurisprudence carry him beyond its narrow limits and introduce a rationale of juridical organization which, to be consistent, he should deny. If we pursue this line of criticism we are shown the real defects of his method and the system which it produces.

Duguit, as we have said, regards the personality of the state (or of any juridical organization) as a pure fiction, a 'metaphysical' conception which is utterly untrue to fact. Really there is no such thing, but simply a number of particular persons and groups of such particular persons, some of which preponderate over others. Thus, all that we can and need do in the juristic treatment of

[1] *Ibid.*, vol. i, p. 9. *Vide* also *Transformations du Droit Privé*, p. 140.
[2] *Law in the Modern State*, pp. 148–9.

collectivities is to differentiate between those who govern and those who are governed. The former do not govern by virtue of any right inherent in their wills, as the classical theory of sovereignty would have it. They are not the lords of society but its servants. They too have no rights but only duties, and these are to impose their wills when in conformity with the objective law, by means of the power of coercion put in their keeping.[1] The state is not the nation personified and as such invested with the right of sovereignty. It is one with the government whose business is to serve the demands of objective law.[2] The responsibility of the state is simply a vague and misleading expression for the individual responsibility of those who govern, and these are subject to the same objective law as those whom they govern. It follows that the liability of the governors in respect of their actions is to be ascertained in accordance with the principle of vicarious liability. They are in the position of trustees who become personally liable for their acts in so far as they exceed the purposes of their trusts.

Now it may be conceded that Duguit has so far remained true to his realistic method if we admit, in spite of the objections of logicians, the possibility of a pure empiricism. It is, indeed, questionable whether the unity of collectivities which the doctrine of corporate personality asserts is not as much an observable fact as the integrity of the individual. But it is our present purpose to follow Duguit on his own ground, and we will therefore merely observe that it shows how truly Comtian is his thought. He is ever on the watch against the conception of substance. He uses only the category of relation, and therefore he remains content with an

[1] *Traité de Droit Constitutionnel*, vol. ii, p. 3.

[2] This view is also held by Mr. Laski, *Authority in the Modern State*, ch. i: 'Disguise it how we will, the sovereignty of the state will mean in the long run the sovereignty of the rulers who govern it' (p. 265).

But there are important differences between the writings of Laski and Duguit. In his later work, Laski emphasizes, as Duguit does not, the 'federal nature of society' and the need it has of an 'organizing authority' (*ibid.*, p. 74). But he does not explain what this 'organizing authority' is. He does not identify it with the state.

Laski's writings are a source of rich information to the jurist and the historian. More consideration would have been given to them if our discussion of Duguit's work did not cover that part of pragmatic jurisprudence with which we are concerned. We may, however, note here that Laski's work manifests a tendency to break away from the realistic point of view. Whereas in his earlier work, *The Problem of Sovereignty*, he is an uncompromising 'pluralist' (pp. 10, 23–4), in his *Authority in the Modern State* he stresses the synthetic aspect of political organization. We venture to suggest that if Mr. Laski continues on the lines of his later work he will make contributions of still greater value to the jurist.

atomic view of society as a working hypothesis for his purpose. So far, therefore, we may admit the consistency of his claims as a realist or pragmatist.

But when Duguit proceeds to deal with the objective law in respect of its intrinsic character,[1] he introduces new considerations which lead his thought beyond the limit of simple observation. He realizes that the mere vagaries of public opinion will not produce that well-defined system of relations which constitutes the law of any civilized community. However much and rightly he relies on the difference between mob-rule and representative democracy, on the control which the ballot effects on the expression of public opinion, he realizes that this does not meet the difficulties of the lawyer, who requires something more in order to interpret the juridical organization of society. Public opinion may define fairly accurately what social relations are to be observed as laws, but it does not and could not be expected to determine where the responsibility lies when the law has been broken. Laws are necessarily generalizations, a fact which Duguit considers to be the surest safeguard of our liberties.[2] For their application the lawyer requires certain guiding principles by which he may introduce into social intercourse that logical structure without which, Duguit too must admit, there can be no law and order. Thus Duguit attempts to supply certain juristic principles in accordance with which we are to apply the objective law. In those which he employs in the treatment of collectivities we have clear evidence of a departure from his purely realistic method.

Duguit discards the conception of subjective right because, for its application, we should require to know that which is scientifically unknowable, the intimate nature of the human will.[3] But, he says, it is an observable fact that man is conscious of an end when he wills to do anything.[4] This end or purpose is all that we can positively know about human action. It is the only observable indicator of human effort, and the law is concerned with it alone. In place of the doctrine that laws protect subjective rights Duguit, therefore, maintains that juristic laws are laws governing the ends of human action.[5] These laws, of course, apply only to wills con-

[1] *Ibid.*, vol. i, p. 288 ff.
[2] *Law in the Modern State*, p. 75.
[3] *Traité de Droit Constitutionnel*, vol. i, p. 8.
[4] *Ibid.*, vol. i, pp. 13–15.
[5] *Ibid.*, vol. i, p. 319, 'Les lois juridiques sont des lois de but'.

scious of the ends which determine them. Hence the collectivity as a whole cannot constitute a distinct legal subject, for it has as such neither will nor consciousness. All that it presents is a number of individuals organized for a common purpose. This purpose is what the law protects and not the individuals either individually or collectively. The latter do not enjoy subjective rights which the law protects, but have only duties which the law enjoins them to observe for the realization of the common purpose which it protects. Duguit records with approval that the law of 1901 made the purpose the essential element in an association, and he accepts it as his guide in determining the law of associations. Thus it is in the purposes of human association that he looks for the rationale of juridical organization. Faithful to his empirical method he looks to current social movements for a clue to that organization of society to which it points. The result is that he gives his enthusiastic support to syndicalism, and contemplates the state as a collection of public services, each with its distinct purpose.

In order to show that Duguit has transcended the limits of his realism, it is sufficient to point out that it is no longer in the sphere of social sanction alone that he finds the basis of law but also in the rational organization of the purposes of social intercourse. Duguit has indeed made jurisprudence what Stammler made it—a science of purposes (*Zweckwissenschaft*). True, he opposes any *a priori* treatment of it. He regards it as a purely empirical science. But it is idle for Duguit to maintain that his realistic method, which identifies the real with the observable, can satisfy its aims, though it be an empirical science. It obviously implies that the complete reality which the jurist seeks is not merely the observable, but that which satisfies the demand for systematic organization in the world of human purposes. Duguit is no longer bent on reflecting passively the actual condition of social intercourse, but now insists on the rational organization of social effort. He is no longer a pure Comtian analyst, but a constructive thinker demanding a new synthesis of social life. The latter must take on a certain form. As jurists we must insist on this. It is the very essence of juridical organization, of that actual solidarity which Duguit does not hesitate to speak of as something good in itself. In short, Duguit, however unwittingly, has made jurisprudence a normative and constructive science.

To appreciate how far he has wandered from the strictly limited

sphere of inquiry with which he began we need only consider his startling definition of the *droit objectif* as permanent in its principle, infinitely changing in its application.[1] This recalls Stammler's 'natural law with a variable content' (*Naturrecht mit wechselndem Inhalte*).[2] As Gény points out, Duguit introduces in a new form the essential idea of a natural law.[3] But this important criticism must be left to those whose business is an exhaustive inquiry into Duguit's entire jurisprudence. Here it is enough to state merely its broadest results. It points to the inadequacy of Duguit's realistic method, for no sooner does he come to grips with the concrete problems of jurisprudence than he sacrifices it, and works with 'metaphysical' conceptions such as he never hesitates to condemn as unscientific and unreal. Unconsciously Duguit is driven to recognize that we cannot achieve the orderly regulation of social intercourse merely by observing social facts and describing them in terms of the relative strength or weakness of the social sanction which they enjoy. He has come to realize that these facts require interpretation, that their true nature is not evident to our simple observation, but only to a critical examination of them in the light of certain general conceptions, which function as a natural law in relation to the changing world of social intercourse.

Now, in place of the theory that the law protects the subjective right of a corporate person when it deals with an association, Duguit puts forward the theory that the law protects simply its purpose. The individual wills, which operate in the service of this purpose, are not the creators of the network of legal relations, the juridical situation. This results only from the reaction of the objective law on the purpose which is *in itself* indifferent from the juristic point of view, until it has received its character from the objective law. If the purpose is licit, i.e. if the objective law approves it, then it is protected by law. Thus Duguit's theory of association does not introduce the conception of subjective right but preserves the view of the individual as a subject of duties only, and as such on a level with, and subject to the same objective law as, all other individuals. This equality of status, this absence of any hierarchical subordination of one individual to another, is equally prominent in Duguit's treatment of associations. His

[1] *L'Etat, le droit objectif et la loi positive*, pp. 11, 98–109, 150–2.
[2] *Wirtschaft und Recht*, 2nd ed., p. 181.
[3] *Science et Technique*, part ii, pp. 252–3. *Vide* also pp. 239–43.

great claim is that he has substituted for the old relation of subordination, supported by the doctrine of sovereignty, a new relation of co-ordination among corporate bodies.[1] We must examine the meaning and truth of this claim.

Difficulties arise as soon as we attempt to deal with a conflict of associations or, as Duguit would think of it, a conflict of purposes. In the first place we need an ultimate authority or explicator of the law in order to settle such a conflict. Purposes cannot be co-ordinated without some one co-ordinating them, and, moreover, some one whose decision has a certain finality. On this point Duguit, like all syndicalists, is thoroughly vague. Of course the words 'ultimate authority' are hardly pleasant for him. They smack too much of the idea of sovereignty. But he has not quite abandoned what they stand for. In reality he has transferred the power which they signify to the law-courts. In spite of his emphasis on the social sanction of law, Duguit's aim is always what the Germans call a *Rechtsstaat*, a state governed throughout by law. And thus he would put the explication of the law in the hands of the judges. Their judgements will not be arbitrary. They will not create the law. They will merely *declare* the objective law, which is a fact embodied in the actual social relations and evidenced by public opinion. We must, therefore, look to Duguit's *droit objectif* in order to see how his judges would solve a conflict of associations.

It is clear that they cannot distinguish between the more worthy and the less worthy purpose. This distinction would be metaphysical and must, therefore, be ruled out as unscientific. But Duguit's realistic conception of the *droit objectif* does not afford any other solution. The society which it describes in terms of the external relations of individuals is pluralistic, atomic. The state is merely a *collection* of public services. It cannot therefore appear as a system supervising the relations of its parts. The judges who declare the objective law cannot, therefore, by reason of its very nature, subordinate the purpose of one association to that of another.

The trouble arises from the fact that Duguit's theory of association aims at an ideal which is incompatible with his realistic conception of *droit objectif*. Co-ordination means systematized relation, and it is, of course, the end we seek in any attempt to

[1] *Law in the Modern State*, pp. 118–21.

rationalize experience. But it is not something that we discover ready-made in the complex world of social fact. It is something which the jurist seeks to introduce into its ever-changing relations. And he is not merely concerned with the formal definition of a desirable condition of society, but also with all that is essential to its realization. It is here that Duguit fails. He does not provide the essential means whereby the *droit objectif*, the true law of society, will receive its expression.

The chief error of Duguit's jurisprudence is his abstract conception of law. He treats it in true Comtian fashion as a thing-in-itself, as a complex of external relations between the individuals of a mechanically conceived society. He considers these relations without any reference to the individuals between whom they exist. The individual is not a subject of right (*sujet de droit*), and is thus not a determining factor in the juristic equation. Duguit excludes from the definition of juridical life the personal element, the element of will. True, he regards the individual as the only living reality, and it is on the wills of the majority of such individuals that his *droit objectif* depends. But the great defect of Duguit's system is that it provides no passage from the *droit objectif*, based on social sanction, to the rational co-ordination of social life, which is the very soul of juristic thought, the aim of our most technical preoccupations in the realm of law. When Duguit propounds his theory of objective law he is *par excellence* a realist, and makes the individual will the sole factor in the making of the law. But later when, as we have shown, he transcends the limits of his realism and tackles the problem of social co-ordination, he discards the element of will as irrelevant. The social synthesis at which he aims is a system of co-ordinated social purposes, and this he proposes to achieve without introducing as elements of the juridical situation the wills behind those purposes. By doing so, he must abandon his realism in favour of what can only be called an abstract rationalism. His *droit objectif* cannot help him. Syndicalism, which is the pattern of juridical organization that it suggests, is no solution of the problem. It merely consecrates the pluralistic condition of social purposes which it is the jurist's business to systematize. It is the doctrine of *laissez-faire* applied to the problem of jurisprudence.

What is the reason for this failure of his *droit objectif*? For an answer we must go to the very foundations of his realistic juris-

prudence. Duguit rightly maintains that the objective law is discoverable only in the world of actual social fact. But he does not appreciate the true significance of such social fact for the jurist. Like Comte, he does not give jurisprudence its own place and method as a science. He does not realize that facts have no meaning except in so far as we make judgements about them. They are significant only in so far as the synthetic activity of mind moulds them into something like a coherent system. Briefly, in order that they may be understood, facts require something besides observation: they require interpretation. Now, Duguit is right in emphasizing the empirical and contingent nature of juristic relations, their foundation in concrete social fact. But his simple method of observation cannot help us to elucidate them. It ignores what Duguit does later appreciate, the necessity of their co-ordination. It offers us no synthetic principle whereby that co-ordination may be effected. Thus, when Duguit proceeds to deal with the problem of co-ordinating the activities of corporate bodies, his *droit objectif* offers no more than a doctrine of *laissez-faire*.

The trouble arises from the fact that Duguit has an abstract and distorted view of the social reality which his objective law is supposed to define in terms of juristic relations. He views it as a mechanical world of relations, and, in doing so, drops out of account the element of personality, which is the essential differentia of the social as distinct from the natural world. He would make an exact science of society, which is impossible, for society is conditioned by centres of volition whose activities it is impossible to predict or fathom. True, this is just what Duguit emphatically asserts as the ground of his objection to the conception of subjective right. But he errs in excluding on that account these centres or wills as elements of the juridical situation. In doing so, he simplifies his view of society to the point of distortion. He thereby fails to appreciate the true significance of those purposes which he wishes to co-ordinate. He does not realize that the world of social effort is essentially a *world of claims*, that social purposes are not in themselves the stuff of social life, but only in so far as they are the purposes of individuals. If we drop out of account the subjective element of will behind these purposes, we distort their real nature, and cannot hope to solve the problem of their co-ordination.

By discarding the conception of a subject of rights Duguit has

left himself without a middle term. He appreciates the *de facto* side of law, its dependence upon social sanction. He also admits, though unwittingly, its *ideal* side, its co-ordinating function. But he does not and cannot connect these two aspects of juristic relations as aspects of a single process of juridical life. This cannot be done without the conception of the individual as a subject of right. In such a subject we have the meeting-point of the two functions of law, the registration of fact and the solution of a social problem, for in the individual alone is the fact born, and through him alone can the solution be achieved.

To sum up, Duguit has failed to provide the necessary means whereby the *droit objectif* can receive its true expression. We admit fully that law has its foundations in social fact. But as such it is not a complex of mechanical relations but the expression of a living society. In so far as it synthesizes society it renders explicit that to which the actual process of social life points. It does not impose upon it something foreign to it. If it did, it would be unscientific and untrue. But this does not mean that law is a mere description of social facts. It is Duguit's failure to appreciate the *normative* character of social facts that leads him at first to treat them as the natural scientist treats natural facts. His point of view in their study is purely analytic. He does not allow for the synthetic character of social effort, but sees it merely as the self-assertion of particular individualities which are external to each other. Hence his use of the conception of social interdependence as a sociological hypothesis suitable for the jurist. We have seen how it ultimately avoids the problem of social co-ordination and takes refuge in the theory of syndicalism.

Our objections to Duguit's jurisprudence are not the results of mere logical disquisitions on method. They rest on the contention that Duguit has an inadequate appreciation of those facts with which the jurist deals, and therefore fails to provide solutions for the problems of jurisprudence. Syndicalism is not properly a juristic theory. It is a type, or better, an aspect of political organization. It sets up the very opposite of the centralized state, and stresses the necessity of decentralization in government. But in itself it is not a satisfactory political theory, for it does not solve the problem of the political co-ordination of the decentralized groups. It may be a truer account of one society than of another, according to the more or less pluralistic character which each

exhibits. But it can never stand as an adequate political theory of any community. If it does, then we are not dealing with one complex political organization but with several independent ones. Duguit, impressed by the syndicalistic movement in Europe and especially in France, has been carried away to the extent of confusing an aspect—perhaps a temporarily predominant aspect—of political organization with its entire character. Furthermore, he has accepted syndicalism as a juristic theory, and so barred himself from offering any adequate solution to the problems which society presents for the jurist.

In the first place, if we merely observe social facts, we do not get the atomic theory of society which Duguit supports. We observe degrees of closeness in the co-operation of individuals which makes that unity of collectivities, to which the doctrine of corporate personality seeks to give expression, as much an observable fact as the integrity of the individual. Insult the Church and it reacts to all intents and purposes as an individual would react under the same circumstances. We accept the acknowledgement of liability by a railway company without knowing who are its shareholders or even its directors. We abide by the decisions of the executive of our club, as if we ourselves had arrived at them. Nor do we observe merely so many independent social organizations exhibiting a more or less high degree of internal solidarity. We also observe a process of co-operation between them, a reciprocal modification of their claims in the interest of more cogent ends; indeed, a voluntary subordination of one group to another. High tension between an organization of trade-unions and parliament at the moment of a grave foreign crisis gives way, and we observe the nation moving as a united whole for the protection of national interests. Or, it may be that the tension continues and renders the economic existence of the nation impossible. This, however, does not mean that the problem of co-ordination between the conflicting groups has been laid aside. The problem has become acuter. The demand for a new synthesis is more than ever present. Neither party wishes to destroy the other; the claims of both are only for a readjustment of their respective functions and positions. This is what a simple, unbiased observation of actual social facts shows us. The actual process of differentiation which is so strong in the modern state, its redistribution of functions, is the necessary result of the increased complexity of social life. But in

principle it is nothing new. There never has been and never will be an absolutely centralized state. The Austinian theory of sovereignty has never been entirely true in fact.[1] If syndicalism be understood to mean that society should be organized on a functional basis, we may say that every society has been syndicalistic to some extent, in spite of theories which have attempted to disguise the fact. But to raise this one-sided view of political organization to the status of a juristic theory of the state is to abandon the problem of jurisprudence. It is to make a virtue of chaos, and to seek the drastic consolations of M. Sorel's *Reflections on Violence*.[2]

We have said that Duguit does not distinguish between the fact of material force and the argument of political power.[3] This is the necessary result of his empirical or realistic point of view, which merely observes social facts and describes them in terms of the social sanction they enjoy. But we have shown how this is an inadequate account of social facts in so far as it does not recognize their *normative* character. Only if we allow for the latter can we hope to make juristic laws other than arbitrary, to make them truly objective in the sense of being interpretations of social facts. The meaning of social intercourse is not summed up in the material force behind it. This is not an adequate account of the social sanction of law. We admit Duguit's claim that law must have the sanction of society, but it is not sufficient to interpret that sanction as a superior material force which will prevent the violation of the law. We must recognize the way in which that sanction operates. And this leads us to distinguish between the fact of material force and the argument of political power. Society is not a union of individuals maintained by force. If that were true, then Duguit's assertion that man is by nature social would be meaningless.[4] The true meaning of this judgement, which alone explains the possibility of social life, is that society is no artificial organization imposed upon men, but the spontaneous creation of their inherent natures. They give their sanction to laws, because these are the safeguards of a life which is natural to

[1] This, as we have observed, is admitted even by Dicey. *Vide supra*, part i, ch. i.

[2] Duguit claims that his theory, i.e. syndicalism, alone does away with the 'arbitrary state' and gives full freedom of association. *L'État, le droit objectif, et la loi positive*, pp. 253, 370, 392.

[3] *Vide supra*, p. 84.

[4] *Traité de Droit Constitutionnel*, vol. i, pp. 11–12 and p. 22.

them. Material force is simply the means by which they will in the last resort enforce obedience to the law, but it is not the real *raison d'être* of the law. It is only an accessory to the fact that law is the necessary framework of a life natural to them. The conviction that the law is necessary because it maintains the true conditions of social intercourse is the real basis of law. This view alone can explain the existence of any juridically organized society. Firstly, it explains why the law will in the last resort be enforced by the use of material force. Secondly, it explains how that rational systematization of social life which any body of laws presents can be not merely an academic theory but a fact actually governing the lives of men. Lastly, it explains why men do feel a responsibility in the matter of obeying the law. The social sanction behind the law is, therefore, not simply a fact of brute force, but a fact expressing a profound argument. It is emphatically an assertion of the individual that society should be governed by reason and justice, and not by the arbitrary compulsion of superior physical force.[1]

This was quite clear to Hobbes. His distinction between the natural and the civil condition of man insists on the rational, non-arbitrary character of social or juridical organization. But through lack of sociological insight into the life of society, and a political outlook narrowed by the cramped politics of his day, he failed to provide a satisfactory rationale of juridical organization. His doctrine of sovereignty, which was essentially that of Austin, is, as we have shown, a travesty of fact. Like Austin, he was led astray by a dialectic which works out its solution to juristic problems without reference to the inherent character of the social fact. But his fiction of the social contract by which the state of nature gave way to the civil state contains the profound recognition, too rarely observed by Hobbes's critics, that juridical society is based, not upon force, but upon the conviction that the law is necessary to man, and upon the will to be governed by reason and justice. Unfortunately, Hobbes did not appreciate all the implications of this view. He failed to notice that his citizen is no longer the law-

[1] It may be objected that Duguit also traces the creative power behind law to a 'sentiment de la justice' and a 'sentiment de la socialité' (*ibid.*, vol. i, pp. 45 ff.). But it is just the defect of Duguit's jurisprudence that it does not take this into account when dealing with the sanctions of law. He neglects their character as resulting from the operation of sentiments of sociality and justice. The psychological analysis with which Duguit begins his *Traité de Droit Constitutionnel* does not enter into the main body of his jurisprudence.

less man of nature, and therefore cannot be expected to submit to a régime of centralized government, which would be fitting only in a society of comparatively lawless men.[1] Once the fact of civil life is granted, we must also admit the co-operative character of the individuals who make it. It follows that Hobbes is wrong in making the person or few persons who possess sovereignty the reservoir of all rights. By doing so he ignores in the first place individual initiative, which is the real moving force in social co-operation, and in the second place the individual's sense of responsibility, which is the only real foundation of his obedience to the law.

Now, Duguit also ignores the initiative of the individual and his sense of responsibility. The individual is for him no subject of rights but only of duties. These duties are *imposed* on him. He is *forced* to fulfil them. Legal relations are *external* to him. Duguit does not regard the individual as a determining factor in legal situations. In Duguit's jurisprudence the individual is essentially an independent unit and cannot, therefore, be treated as a positive factor in that co-ordination which the law is to effect between him and other individuals. The initiative of the individual, his will, which is in the last resort the source of all social effort, is ignored. We have here a serious failure of Duguit to realize the aim of his realistic jurisprudence, namely, a juristic system which follows social facts with the utmost precision. Nor does Duguit allow for the individual's sense of responsibility. He maintains that the individual obeys the law because he cannot do otherwise. We too would admit this, but not for the same reason as Duguit. He thinks the individual must obey the law because in the event of his disobedience a general social reaction would set in against him. We, however, would object in the first place to this materialistic interpretation of the social sanction of law. We would ask what it means that law has this sanction, and would give this reply. It signifies that the society which maintains it is not a collection of independent individuals constrained into obedience by superior physical force or even the fear of it but an association of *social* beings who sanction the law because they consider it

[1] Of course, if they were quite lawless and natural in Hobbes's sense of the word, then any society or juridical organization would be *ex hypothesi* impossible. In other words, it is impossible to see how society could exist at all if Hobbes's theory of sovereignty were true in fact.

necessary to their existence and who obey it because they have a sense of responsibility as members of the associate body.[1] To sum up, social facts are normative. Social life is co-operative. Legal co-ordination is not something imposed upon it. It is the well-defined expression of its inherent character. But it is not something which merely happens in the casual run of social intercourse. It is not merely observable; it is something which requires for its understanding the profoundest logical thought; it requires both the conception of subjective right and the conception of corporate personality.

Once we appreciate the social fact as a living fact we are compelled to use the conception of subjective right. If we avoid treating the purposes of human action *in abstracto* and consider the social fact of human action in its entirety, then we cannot do without the notion of a *subject* who is the author of that action, the living force which promotes and realizes its purpose. Not the purpose alone but man in pursuit of the purpose is the social reality with which the jurist must work. The world of human purposes is essentially a world of claims, a world in which the individual *claims the right* to realize this or that purpose. This is no metaphysical theory of the kind which Duguit rightly criticizes. It is merely an account of what actually happens in the course of social life, and this Duguit does not appreciate in spite of his professed realism. Furthermore, this world of claims is not merely atomic. If it were there would be no society. Duguit fails again in that he does not appreciate the co-operative character of human effort. The individual, when he claims to realize a certain purpose, does not thereby cut himself off from other individuals. He claims to realize his purpose *in society*. He claims social recognition and sanction for his effort. True, he may be selfish and self-centred in doing so. But the fact of importance for the jurist is that his claim is social. It is a claim to co-ordination within the social system as well as a claim to self-expression. This co-operative character of human effort gives to social facts what we have called their normative character. They are not atomic but

[1] Here, again, it may be objected that Duguit's 'sentiment de la justice' and 'sentiment de la socialité' admit this. But the point is that his early view of law as based on these sentiments is incompatible with his theory of social reaction, which does not allow the normative and co-operative character of social facts. It is the latter theory that supplies the foundations for his syndicalistic jurisprudence.

essentially synthetic. It is their inherent character to demand, for their understanding, a social synthesis in which they are co-ordinated with one another. And unless we consider the individual as a subject of right, a subject claiming a right to self-expression within the social system, we are not in possession of the real facts which we, as jurists, must co-ordinate.

Similarly we require the conceptions of subjective right and corporate personality in the co-ordination of collectivities. If we do not treat the collectivity as a distinct subject claiming a right we fail to appreciate its true significance as a social fact. The collectivity is a standing affirmation of the claims of a number of individuals to realize a common purpose. But, as in the private claims of individuals, it is not a non-social claim. It is a claim to social co-ordination with other collectivities within a comprehensive body politic. Society is not an atomic collection of independent collectivities. So long as the purpose of the collectivity does not exhaust all that its constituent individuals aim at—and no single collectivity does this—so long will the freedom and independence which the collectivity claims be necessarily limited. On the one hand it will be limited by the inherent limitations of its purpose, and on the other hand it will be limited by the claims of other collectivities pursuing other purposes. But the problem of determining the precise limits to the freedom and independence of a collectivity is not always an easy task. We submit and propose to show in the following chapters that we cannot solve it without using the conception of corporate personality.

It is here necessary to state something which cannot be fully discussed till later. Duguit, as we have said, deals with juridical phenomena only by means of the category of relation. He therefore refuses to employ the conception of corporate personality, since it introduces the unscientific notion of substance. He thinks that the phenomena of collective life and activity can be juristically construed in terms of legal *relations between individuals* pursuing a common purpose. Now we do not deny that this point of view has a certain value and that we may go far with it alone. A proof of this is the way in which with considerable success the doctrine of corporate personality has been shelved by English lawyers in favour of the doctrine of trusts. As we have emphasized on more than one occasion, collectivities do not all require the same treatment. They present an infinite variety in respect of their internal

solidarity and the importance of their purposes. It would be idle to maintain that some of these cannot be treated adequately without the conception of corporate personality. All that we maintain is that in some cases this conception becomes indispensable. Without attempting to draw the exact line in this matter, it is sufficient for the moment to say that the conception of corporate personality is essential in cases where the collectivity in question possesses a certain degree of solidarity and permanence. It is to these cases that we shall refer in the following discussions.

Now Duguit does not provide the means whereby to determine the precise limit to the freedom and independence of a collectivity. Externally his *service publique*, which he regards as the type of the association, has no limitations. It is impossible to see how the independent public services, of which the state is merely a *collection*, can be prevented from extending or narrowing their respective purposes according to the wishes of their members. The syndicalistic theory of the state cannot accept any limits to the activities of a collectivity other than those resulting from violence or the fear of it. It leaves collectivities logically indifferent to each other in their external relations. That is, it leaves them externally unrelated.

Nor does Duguit provide the means of determining any internal limitations to the freedom and independence of a collectivity. True, he maintains that it is limited by its purpose. But this is in itself too formal and general a conception to help us in the juristic treatment of collectivities. It is of no use if we have not the means of determining just what the purpose of a collectivity is. This Duguit does not and cannot give us. In omitting the element of will behind the purpose of the collectivity, he distorts the real nature of that purpose as a living social fact, and, therefore, cannot judge it truly. The omission is, however, in no way accidental. It is the logical outcome of the fundamental conceptions underlying Duguit's jurisprudence.

In determining the law of an association, Duguit makes no reference to the collectivity which constitutes it as a social reality. He concentrates purely on its purpose. It is this purpose that the law protects, and not the individuals who pursue it.[1] Thus

[1] *Traité de Droit Constitutionnel*, vol. i, pp. 319, 358, 368, also p. 250. But, note, Duguit does not make a contract the foundation of the association. *Vide Law in the Modern State*, p. 114.

the judges who in Duguit's *Rechtsstaat* will decide whether an association is exceeding the legal limit to its activities will ask whether it is pursuing the purpose for which it exists. Let us suppose that the association is a religious one and desires to amalgamate with another religious association which does not subscribe to precisely the same doctrines. A great majority of its members vote for amalgamation. The small minority submit that this would mean a departure from the religious trust for which the funds of the association were originally donated, and that these funds may not therefore pass to the new association. The judges will here have to decide whether the association will by amalgamation change its purpose, that is, lose its identity. In other words, they will have to decide a theological dispute. The *Free Church Case* has shown how judges are neither willing nor competent to adjudicate in such matters. Even if they are not biased by virtue of their own religious beliefs, they cannot be expected to have the theological scholarship necessary to a proper understanding of the dispute. It is outside of their own minds that they will have to look for the necessary judgement. But who can supply this judgement other than the members of the association? The judges will therefore have to take into consideration, in judging the activities of the association, not merely its purpose but also the wills behind that purpose. They will have to reckon not merely with dead documents but also with their living interpreters, those who accept the responsibility of fulfilling the purpose defined in the documents. The collectivity will have to be considered as an essential element in the juridical situation, as a subject claiming a right which it may prove in order to obtain legal protection in its exercise. Where it proves that it alone can decide a certain point, there the judges will have to accept its decision. Where it cannot prove this the judges may deliver their own judgement. The further discussion of this theory must be left till later. It is introduced here to illustrate how the problem of determining the limits to the freedom and independence of an association demands our recognition of the collectivity as an essential element of that which the law protects.

It is Duguit's dogmatic empiricism that constitutes his stumbling-block. At first it provides him with a simple theory of social reaction which cannot satisfy the synthetic aim of law. The result is that when he tackles the problem of legal co-ordination he

produces a rationalistic dialectic working on an incomplete account of the social fact. Throughout Duguit's system we see the effects of his failure to bring together these two parts of his thought, that in which he is the naïve realist and that in which he is the rationalist. There is no clearer instance of it than his absolute separation of the theory of the function from the theory of the organ, or the material from the formal point of view.[1] His theory of the function which asserts that we must consider the administrative or legislative act of the organ of a collectivity from the point of view of its 'internal juridical nature without considering the character of the organ who performs it' is the result of that facile realism which leads him to consider the human will as outside the scope of scientific observation, and, therefore, as not a constituent element of the content of legal phenomena. His theory of the organ suffers likewise. It considers the organ as the only one to whom its acts can be ascribed, in so far as it has a will, whereas the collectivity has not. Duguit here misses what we would consider the most significant feature about the organ of a collectivity, namely, that it acts and speaks *as* the collectivity.

But still more harmful than his simple theories are his simple and destructive criticisms of profound juristic conceptions. It is clear that he does not appreciate their true significance. Duguit considers the term sovereignty and public power (*pouvoir public*) as synonymous.[2] This shows that he does not appreciate the true significance of the conception of corporate personality, what it attempts adequately or inadequately to express. Sovereignty is not public power. Public power is merely the instrument by means of which the sovereign enforces the law. It does not possess sovereignty because it has this power, but it has this power because it is the sovereign. The state, according to the doctrine of corporate personality, possesses sovereignty because it is the systematized complex of juristic relations. It is the unitary expression for the organized body politic. This is what the conception of corporate personality brings out. The fact that the collectivity can express itself and act only through an individual organ or representative is no argument against its corporate personality. Duguit has not done justice to the distinction between the 'governors' and the 'governed'. He has not realized that it presents what is the dominant feature of a collectivity for the jurist, namely, that

[1] *Ibid.*, vol. ii, pp. 228–31.

[2] *Ibid.*, vol. ii, p. 85.

it is so organized that there are certain persons who are empowered to act on behalf of the entire group, and whose vicarious acts will be honoured by it.

We may now sum up the chief objections to Duguit's jurisprudence. Duguit's errors all arise from his crude empirical method, which is logically impossible. Duguit is always, though unwittingly, working with abstract conceptions. Unfortunately he is not 'critical' of these, and his Comtian bias leads him to a superficial and incomplete understanding of the social fact. He treats it by means of the category of relation only, and considers juristic laws as external relations between the individuals of an atomic society. The results of this mechanical interpretation of social relations, by which he attempts to construct a positive or 'natural' science of society, are his denials of subjective right and corporate personality. But these denials, as we have shown, arise from his failure to appreciate the normative character of social facts, the co-operative character of social effort, which is the real foundation of the synthetic character of law. By leaving out the element of will behind human purposes and treating the latter as in themselves the content of law, Duguit distorts the social fact. He puts an artificial abstraction in place of the entire living reality. Not the purpose of human action but man-in-pursuit-of-that-purpose is the datum of the jurist, the content of legal relations. He acknowledges the importance of the will in his realistic theory of the *droit objectif* and the necessity of rational synthesis in his theory that juristic laws are laws of the purposes of human actions. But he provides no passage from the one to the other. He does not realize that they are but aspects of the entire juridical situation. In the one he is a crude realist. In the other he becomes a rationalist. His system of jurisprudence manifests throughout the effects of this false, dualistic treatment of what are merely aspects of every juristic judgement. He himself insists that the law must be a synthesis of social facts. But he is prevented from achieving this by working on facts which are essentially atomic and using a method which is essentially unsynthetic.

The jurisprudence which Duguit has constructed on the foundations of Comtian sociology does not solve the problems of the jurist. But Comtian sociology is not the only account of society which those who call themselves sociologists have offered. In

spite of its comparative youth, the science of sociology presents already a great amount of intensive reflection and a variety of theories as to the nature of social organization. These the jurist cannot overlook, for they are intimately concerned with the objects of his own study. We shall therefore proceed, in the following chapter, to examine the results of recent sociological inquiry.

II

MODERN SOCIOLOGY AND THE STUDY OF GROUP LIFE

Jurisprudence and sociology — sociology and the special, social sciences — nature of science of sociology — Comtian sociology — Durkheim — recognizes specificity of social fact — his positivism — his theory of the collective consciousness — error of positivism — sociology, a teleological science — psychological theories: Tarde, Le Bon, Freud, McDougall — Giddings' 'consciousness of kind' — dualistic hypothesis of sociological research — limitations of sociological theory — antinomy of society and the individual — their synthesis — data of sociology — psychological theory of 'selves' — qualitative differences of groups — psychological basis of these differences — source of social solidarity, the individual — summary — sociological and juristic theory — importance of this chapter for later discussions.

WE have already stressed the importance of sociology for jurisprudence. This, however, requires further discussion, for it is by no means universally recognized. The blame attaches as much to sociologists as to jurists. Sociologists have not busied themselves enough with law,[1] and so have seldom tried to tell us in what the law as a social fact consists.[2] Jurists, on their part, have not taken sufficient account of the work of sociologists. The result has been a frequent failure to appreciate the social character of juristic problems.

We have shown how law is inseparably bound up with social fact. It is ever historical and empiric. But it is not purely empiric or 'pragmatic', as Duguit maintains. Law is not a mere record of actual social facts.[3] It is also the solution of a social problem. The jurist's aim is not a mere recognition of social facts, but also their interpretation in terms of what they should be in order to contribute to social order and justice. Law is, therefore, ideal as well as historical, synthetic as well as analytic. But these *aspects* of law cannot be separately treated in the neo-Kantian manner. Without the synthetic construction of the jurist, social facts are meaningless from the juristic point of view. Apart from social facts, the synthetic construction is valueless and unreal. Juristic laws apply

[1] e.g., in his *Einleitung in die Philosophie*, the late Prof. Jerusalem makes no mention of juristic literature when discussing sociological problems.

[2] Cf. Vauthier, *Essais de Philosophie Sociale* ('Droit et Sociologie'), p. 274.

[3] Cf. Duguit, *Les transformations générales du droit privé*, p. 71, 'La seule question qui se pose est une question de fait'.

to social facts, not because they are deduced from certain abstract conceptions, but because it is the inherent nature of those facts to achieve their historical development in the manner which these laws prescribe. The jurist, therefore, who does not build his system on the foundation of a sound knowledge of social facts is doomed to produce dogmatic assumptions which are theoretically false and practically valueless. What Höffding says of ethical judgements is equally true of juristic judgements. They must be sociologically possible. It follows that an adequate jurisprudence must have its foundations in a sound sociology.

But it is not easy to produce a sociological jurisprudence. Sociology is not a mature science presenting universally accepted judgements. Its very foundations are still in the making, for its scope and method are matters of keen debate. Thus the jurist is not a little embarrassed when he seeks the assistance of the sociologist. Furthermore, the attempt to construct a sociological jurisprudence tends to obscure, as it has in the past obscured, the difference between sociology and jurisprudence. We have witnessed the possible dangers of such a confusion in at least one case, that of Duguit, and Comte's treatment of jurisprudence is equally instructive on this point. It is, therefore, advisable to preface this discussion of sociological theories by some observations concerning the respective interests of sociology and jurisprudence.

The aim of the sociologist is a *general science of society*, in which the different aspects of social life, studied in the various special social sciences, are co-ordinated and explained as moments in the complete life of society. Every sociologist would probably agree with this statement, but this is so only because it is very general. It is, however, all that we require in our present effort to distinguish sociology from jurisprudence, because the very comprehensive interest which it ascribes to the former is sufficient to distinguish it from the latter. Jurisprudence also has an interest which is nothing if not social. Its aim is to discover how to regulate society in the interests of order and justice. It too is an inquiry into the nature of society, but its interest therein is limited. Every juristic rule is a social fact,[1] but not every social fact has a juristic value. Juridical organization does not comprehend the entire content of social life. There are social relations which the law does not seek to regulate but leaves to the care of morality and religion. Law is

[1] Cf. Aubin, in *L'Année Sociologique*, 1905–6, p. 375.

but the framework of society. It maintains certain conditions of social life, but not all. This, however, does not mean that it is in no way concerned with the nature of the other conditions. It is just on the necessity of allowing for the existence and operation of these other conditions, while not confusing them with that condition which is *par excellence* the concern of the jurist, that the importance of sociology for jurisprudence is founded. The jurist who attempts to organize a community juridically has to deal with a complex of social relations which are facts and must be accepted as such by him. He is further interested in an ideal construction of these facts, their juristic co-ordination. These two aspects of juristic thought we have distinguished by saying that the law has extra-legal or social sanctions, but is further the product of rational thought, which works on the content of those sanctions. The jurist must, therefore, be more than an expert dialectician armed with syllogistic forms. He requires a knowledge of how society distributes its sanctions, what, if any, are the laws of that process of social effort by which communities are born and continue to exist.

In this matter he cannot look to economics, social psychology, political science, and the other special social sciences. It is of course true that law is influenced by and must meet the demands of political, economic, and other types of social movements, and that these have been studied in special sciences, some of which have reached a high level of development. But no one of these sciences can satisfy the requirements of jurisprudence by its own peculiar account of society. Juristic laws do not regulate a society which is purely economic or purely political or purely psychological. They regulate a society which has all these attributes. As Ihering says, the basis of law is nothing less than the entire social process.[1] It may be that a particular legal problem will call one of its aspects into prominence over the others, and then it will be necessary for the jurist to bear in mind more particularly the special view of social relations which it presents. But in order to deal adequately with the general problems of jurisprudence, the jurist requires a view of society which takes all of these attributes into account, not as independent and isolated but as interdependent and interacting forces. We do not hesitate to say that all sound juristic laws have been born of such an understanding of the complex life of the society they were meant to regulate, though

[1] *Zweck im Recht* (5th ed.), vol. i, p. 67.

this understanding was not perhaps entirely conscious and well-defined. But if we are to raise jurisprudence to a level of judgement on which it affirms truth and not fiction, science and not arbitrary assumption—and the increased complexity of its problems which comes with the increased complexity of social life makes this a more and more vital need—then we must seek a more scientific and better-defined understanding of social life. We must have a science of society, a sociology, which will enable us to make our juristic constructions fit truly the social world they are meant to regulate. We must put law on a sociological basis.[1]

Unfortunately sociology does not afford the same rich results as do the special social sciences. To some extent it presents the same contrast to them as did the barren metaphysics of the eighteenth century to the flourishing natural and mathematical sciences of the day. The reason for this is that the watchword of intellectual progress is *divide et impera*. It is only when we have divided the universe that we can submit it to our scientific inquiry. We must swallow and digest the dinner course by course before we can enjoy the consciousness of its excellence *in toto*. But the history of thought shows that this process of abstracting one aspect of the universe at a time, and treating it separately, is as dangerous as it is necessary. Its dangers may be clearly seen to-day in the case of the special social sciences. As biology, physics and psychology have in the past outgrown their respective limits and tackled the problems of metaphysics, so economics, jurisprudence and social science have occasionally outgrown their respective limits and tackled the comprehensive problem of sociology. Marxian economists have sought to treat society as a purely economic organization. They have accepted their materialistic interpretation of history as an adequate social philosophy. Duguit identifies sociology and jurisprudence, in which it is really sociology that suffers the imposition of abstract juristic conceptions. And similarly a host of social psychologists have sketched society as the result of certain psychological forces which they make the only real determining factors of social organization.

Fortunately a general reaction seems to have set in against this abusive use of what are only abstract concepts or aspects of society. The very real successes of their respective sciences have earned the sociologist's respect for each one of them. He has

[1] Cf. Vinogradoff, *Historical Jurisprudence*, vol. i, p. 145.

begun to realize that society is not merely an economic organization, nor merely a juridical or psychological one, but that it is all these, and that somehow they are the differentiated aspects of a deeper current of social life, which includes them all. The object of the sociologist is to discover the nature of this deeper current, the character of its synthetic activity, by which it absorbs and unifies the many different types of social effort. 'The subject of "sociology" at large is synthetical in its very essence, and some means must be found to do justice to this characteristic peculiarity.'[1]

But Sir Paul Vinogradoff also emphasizes the fact that books on general sociology present so often mere 'lifeless abstractions hardly disguised by artificial phraseology and scholastic disquisitions'.[2] He thinks it significant that the best results have actually been obtained where sociologists have purposely applied one-sided theories to the investigation of society.[3] Sir Paul, however, issues a timely warning that 'the reduction of all elements of sociology to unity of principle is almost certain to subject the facts to a kind of Procrustean mutilation'.[4] The successes of such one-sided theorists as Durkheim or Tarde are subject to the discount of an obvious dogmatism. Their works are milestones on the road to a general sociology. They do not satisfy its demands; but by their aid we may well hope to do so. If we examine critically the various hypotheses upon which these one-sided theorists proceed to investigate social phenomena, if we observe where they fail to be 'working hypotheses' and ask why they fail thus, we are on the way to that philosophic synthesis with which the general sociologist hopes to crown the efforts of all other students of social life.

It will now have become clear what the jurist requires of the sociologist. It is a general and comprehensive account of the elements of social life, the nature of their interaction, and co-operation in the process of social intercourse. This does not mean that we require for the purpose of this work a complete *system* of sociology, such as Comte, Durkheim and so many sociologists have sought to construct. Their detailed work, experimental and theoretical, is certainly valuable, and should receive its due acknowledgement from legislators and practical lawyers. But where our problem is one of general jurisprudence, where we are concerned not with particular problems of legal practice but

[1] Vinogradoff, *ibid.*, vol. i, p. 70.
[2] *Ibid.*, vol. i, p. 68.
[3] *Ibid.*, vol. i, p. 69.
[4] *Ibid.*, vol. i, p. 70.

with the way in which, and the conceptions by the help of which, we should tackle those problems, there it is not with the detailed results of sociological investigation that we must deal, but with the hypotheses upon which that investigation proceeds. The field of sociological research, new though it is, provides us with a variety of such hypotheses, and in a critical examination of them we shall learn much that is essential for the purpose of this work.

In spite of his mechanical and individualistic interpretation of social phenomena, Comte had a strong appreciation of the collective aspect of social life. He defined the social fact as that which results from the solidarity of mankind and the continuity of generations. But his abhorrence of the conception of substance, and the mathematical categories which he reverently borrowed from the natural scientist, bound him too fast. He sought to establish the specificity of the social fact but could not do so. He treated it as resulting from the contingent connexion of a series of individual facts, which made each individual fact, and not the series as a whole, the object of social science.[1] This, we have seen, is precisely the sociological point of view which leads Duguit to reject the conception of corporate personality as failing to express any social reality.

We cannot here deal with the historical fate of Comte's ideas; nor can we stop to discuss the kindred sociology which Herbert Spencer fostered in England. It is enough for our purpose if we proceed forthwith to examine the work of a social thinker who gave a new orientation to the science of sociology.

It was M. Emile Durkheim who first gave sociology a subject-matter of its own, for he was the first to insist on the *specificity of the social fact*. He maintained that social facts must be treated as things, as realities distinct from the individual human beings which they comprise.[2] They cannot be understood in terms of the individual consciousness, and that is why psychology cannot deal with the problems of sociology. We must accept the reality of the collective consciousness if there is to be any sociology

[1] Comte's definition of the social fact is really that of the social psychologist who studies social phenomena in terms of the states of the individual consciousness.

[2] *Le Suicide*, p. ix: '. . . social facts ought to be studied as things, that is, as realities outside the individual.' '. . . in order that sociology be possible, it is necessary above all that it should have an object, and one that belongs exclusively to it.' Cf. Durkheim, *Les règles de la méthode sociologique*, pp. 19–20.

at all, and we must interpret it by its own inherent laws. As Durkheim is fond of insisting, the social can be explained only by the social.[1]

Now in analysing Durkheim's sociology, it is well to keep separate his view of its subject-matter and the method by which he treats it. The former is his own invention, and it gives his sociology a novel character. The latter he borrows from Comte. He is really a Comtian analyst working on a more adequately observed social fact. That is why his work is the best starting-point in any attempt to construct an adequate sociological point of view. It enables us to confront positivism with that side of social facts for which it cannot account. But before we do so, let us examine what Durkheim implies in his recognition of the *specific* social fact.

If Comtian sociology suffered from an individualistic bias, that of Durkheim suffers just as strongly from a collectivistic bias. Comte saw society as resulting from the interplay of individual minds. Durkheim reverses the position. For him society comes first and creates the individual from within it. For the sociologist there can be no reality but the collective consciousness; anything else is an offshoot of it. Instead of being produced by individual consciousness, the collective consciousness in the course of its evolution actually produces them.[2] They are its children who owe to it whatever they are.[3] Durkheim thinks in terms of a single collective consciousness differentiating itself in accordance with its own laws into a number of individual consciousnesses. This is the theme of his chief work—*La Division du travail*. We need not follow his elaboration of it. What is of importance to us is the way in which he has turned the tables on Comtian sociology. Everything in the individual's life is to be attributed to social pressure and compulsion. His personality, his thoughts, feelings, morals, laws, all are produced by a process of natural causation, and the original cause lies embedded in a single reservoir of life, the collective consciousness. Impelled by an unconscious teleology, the social organism develops in mathematical progression to produce all the phenomena of personal life. This absolute collectivism

[1] *La Division du travail*, pp. 31, 342.

[2] *Ibid.*, p. 341: 'The opposite view exposes sociology at any moment to taking the cause for the effect and *vice versa*.'

[3] Durkheim is not always definite on this point, e.g. cf. *ibid.*, p. 342, note 3. Also *L'Année Sociologique* (1905–6), p. 360.

Durkheim offers with perfect equanimity as something at which no student of social life will be astonished.[1]

It must be admitted that Durkheim has made an excellent case for his collectivist sociology. Artificial though some of his constructions are, it must be granted that his system does not merely present an enviable coherence, but also casts a great light on many social problems. It is moreover especially valuable as a corrective for the individualistic view-point of sociologists such as Tarde. But in itself it is no less one-sided. If the individualistic theories of Comte and Tarde cannot do justice to the collective side of social phenomena, Durkheim's collectivist theory cannot account for their individual side. It cannot explain, it can only explain away, the reaction of the individual against society. True, Durkheim grants the individual a kind of freedom in so far as he makes the collective consciousness individualize itself in him. But this freedom is essentially secondary. It is a poor, distorted picture of that freedom which the individual does in fact claim, and which gives to his life its inherent character. It is the mechanical freedom of a machine which moves freely within the limits set by the guiding hand of its operator. If this is all that the sociologist can recognize in the individual, then he must deny the possibility of any ideal regulation and direction of human life. He must deny the possible projection of a moral idea anterior to its realization. He must preach a fatalism which admits only of one wisdom—passive acquiescence in actual facts. It follows that laws are mere records of social facts, and give no ideal direction to them.

Thus in spite of his admission as to the reality of the collective consciousness, his insistence on the specificity of the social fact, Durkheim's theory of law is the same as that of the Comtian Duguit. He gives us a richer analysis of the social solidarity which for both of them determines the *droit objectif*. But his conclusions are the same as Duguit's. Both regard the function of law as the registration of social fact, and both regard syndicalism as the true theory of juridical organization.[2] Why have they reached the same conclusions from such different starting-points? The answer is a lesson on the importance of method in sociological inquiry.

Durkheim has not succeeded in giving to sociology its own true subject-matter. He has merely grasped one side of it, the collective

[1] *Le Suicide*, p. 359.

[2] *La Division du travail*, Preface to 2nd ed.

side, and has treated it as if it presented the entire fact with which the sociologist is concerned. Why has Durkheim been content with such a one-sided view of the social fact and given the individual, who makes up society, such a secondary, derivative importance? The answer is to be found in the fact that he is a positivist through and through. He is opposed to Comte's conception of the subject-matter of sociology. He realizes that out of an atomic aggregate of individuals the positivist cannot construct a society. But he remains a pure Comtian in respect of his method of studying social phenomena. That is why he can support only a one-sided view of the social fact. His point of view, being purely analytical, could not synthesize individual consciousnesses into a collective consciousness. It leads to the analytic deduction of the former from the latter. In this way alone will sociology be assured of its own subject-matter, the specifically social; and employing the only category of scientific thought, the category of natural causation, it will then interpret society socially, and socially only. We thus see how positivism cannot avoid a hopelessly one-sided view of social phenomena. Prima facie, the sociologist is confronted by facts of group life in which the individual is as much a constituent element as the entire group. His datum is dual. Society appears to him as both pluralistic and unitary.[1] To begin by laying greater stress on one of these aspects, and treating it as of prior importance sociologically, is sheer dogmatism. Yet this is clearly all that the positivist can do. His method can merely analyse the one as the product of the other. That is why Durkheim begins with a dogmatic assertion of the collective consciousness, and treats every social phenomenon, even the most intimate phenomena of the individual's life, as its products.

Durkheim's work is of special interest to the jurist in so far as he looks upon the law as the richest collection of social facts at the disposal of the sociologist. It must not be forgotten that the collective consciousness is for Durkheim a necessary hypothesis of sociology. It is not a reality with which we come directly in contact. Durkheim has no leaning towards a social mysticism, nor towards an *a priori* rationalism. He is a confirmed positivist, and seeks to 'integrate social science with the general system of the

[1] Cf. Hobhouse, *Social Development*, pp. 181–2, note: '. . . when I compare the unity of self with the unity of society I am impressed by this contrast. To society plurality is essential.'

natural sciences'.[1] Hence, he says, we must substitute for the internal fact (i. e. the collective consciousness), which escapes us, an external fact which symbolizes it, and study the first through the second.[2] This external fact or symbol is the law. Consequently Durkheim maintains that we have only to classify the various kinds of rights in order to appreciate the different types of social solidarity.[3] Now, Durkheim is right, and has done a great service in insisting on the importance of studying the law as a social fact. Unless we do this, our juristic theories are bound to be *a priori* and worthless.[4] But, unfortunately, he does not realize that the mere observation of social facts cannot itself give us a science of them. It can merely give us a description of them. And this is evident from the way in which Durkheim looks upon law as a mere record of social fact, as the transcription of a reality which it no more than describes. It follows that all legal and social theory does no more than record actual fact. It cannot go beyond it and formulate an ideal to be realized. Morality and law are posterior to society, epiphenomena of its evolution. They cannot direct the latter. They merely follow in its wake and pronounce its achievements.

We have already had occasion to show how this point of view cannot account for moral and legal phenomena. We need not again submit it to the same tests. But we must here insist more emphatically on one difficulty which Durkheim, like any positivist, is unable to overcome. Why should he prefer the normal to the abnormal? Durkheim sets out to show what elements in civilization are real, what paths we must follow in order to realize our social destiny. Science, he thinks, is the only element in civilization which, under certain conditions, presents a moral character.[5] Its conclusions alone carry with them an obligatory force, for they record the actual constraint to which we as social beings are subject.[6] It is in a science of society, therefore, that we shall obtain a sure knowledge of how to conduct our social existence. But how can a determinist view of social phenomena, such as that of Durkheim, select one type of social organization as preferable to another?

[1] *La Revue Internationale de l'Enseignment* (1888), p. 29.

[2] *La Division du Travail*, p. 28. [3] *Ibid.*, p. 32.

[4] *Ibid.*, p. 7. *A priori* generalizations are, he says, interesting as *facts*, not as scientific theories.

[5] *Ibid.*, p. 14.

[6] *Ibid.*, p. 14: 'To speak of obligation is to speak of constraint.'

It merely records facts; it does not analyse them. What Durkheim would call a normal condition of society is no more a fact than what he would call an abnormal condition. Anarchy may be as much a fact in a particular society as the rule of law in another. Individualism may be actually the dominant character of a society at one time, collectivism at another. Why should we choose the one rather than the other as a social ideal? If either is a fact, then science must accept it, and what science accepts is obligatory. In other words, Durkheim, like any Comtian, is a pragmatist who identifies the actual and the ideal, facts and values. He merely reverses the fallacy of the Hegelian idealist. The latter identifies the ideal with the actual; he treats ideal conceptions as if they were historical facts. Durkheim considers actual social facts as necessarily ideal because they are facts.[1] Consequently, he can but acquiesce in a fatalism which allows that whatever is is right. And this point of view can only lead to a sociology which is pure descriptive history.

We need not proceed to insist on the inability of Durkheim to deal with the problems of jurisprudence. It follows from his system that the jurist must simply frame his theories in accordance with a scientific sociology which, for its part, is concerned with the description of social facts. The jurist will be not a critic of juridical organization but merely an editor of legal rules which exist *de facto*. His work is not the guidance of law into the realization of its ideal purpose, but merely the declaration of hard social facts. Just as there is no reason why the Durkheimian sociologist should prefer the normal to the abnormal, or even draw the distinction, so there is no reason why the Durkheimian jurist should prefer a good law to a bad law, or even draw the distinction. These distinctions imply judgements of *value*, and such judgements do not fall within the horizon of the scientific determinist. But it is just because the sociologist and the jurist are both concerned with judgements of value that the point of view and method of natural science will not serve their purposes.

It would be an interesting and valuable work if some psychologist were to analyse the mind of the scientific determinist. Though his inspiration professes to come from the prosaic world of the natural sciences, his work is anything but lacking in humanity.

[1] Cf. Pécaut, 'Auguste Comte et Durkheim', in *Revue de Métaphysique et Morale*, Oct.–Dec. 1921, p. 645.

Comte wrote with the passionate warmth of a prophet. Duguit is never far from the living social forces of his day. Durkheim's work breathes the rich experience of a man who knows and loves the world he lives in. What, then, is it that leads these thinkers to adopt a point of view which produces narrow dogmatisms and fashions human life to the pattern of the natural world? We must leave it an open question. The answer would probably help us much to understand the work of Durkheim. As it is we must refrain from deciding whether his dogmatic, one-sided sociology is really born of his determinist convictions, or whether the latter are adopted because they lead to a sociological theory which appeals to him emotionally. We will therefore content ourselves with showing how the two are bound up with one another, the one being a method unsuited to the explanation of social life, the other a one-sided appreciation of social phenomena.

It is the great error of positivism that it does not appreciate the difference between social facts and natural facts. The natural scientist studies certain objects which present themselves to his consciousness, without taking into account that very consciousness without which they would not exist for him. He treats these objects as a world of causal relations existing independent of human consciousness. This abstraction is the very essence of natural science. Its judgements are consequently judgements of scientific fact and not of value. It merely distinguishes between that which *is* and that which *is not*.[1] It does not, and cannot, attribute to the facts it studies any value relative to human life.

Now, the sociologist cannot treat his facts in the same abstract way. Society exists only in and through the human consciousness. In so far, then, as he abstracts social facts from the world of consciousness, he destroys the facts themselves. He denudes them of all that characterizes them as *social* facts. Social facts are facts of consciousness, and no point of view can hope to understand them unless it is capable of appreciating the inherent character of consciousness. That is why we cannot apply the method of the natural sciences to the problems of sociology. The category of natural causation cannot explain the facts of consciousness, for

[1] It does not *prove* the existence of the natural world. It takes that for granted, and, having done so, it makes statements of fact about it.

It is interesting here to note that the physicist is coming to emphasize more and more the hypothetical nature of the universe he professes to describe.

consciousness is determined by *ends*. Its life is essentially normative, that is, its development cannot be understood except in terms of the progressive realization of an ideal. Sociological judgements are, therefore, ideal judgements of value. They do not merely record social facts, but judge them as realizing or failing to realize a condition of society in which human life finds its true development. In other words, the sociological point of view is essentially teleological.[1]

But psychology is also concerned with the nature of consciousness. Moreover, social psychology studies consciousness in its social context. It has, therefore, frequently been thought to fulfil the function of sociology; but it cannot do so for two reasons. In the first place, its point of view is positive; it applies the category of natural causation to facts of consciousness. Consequently it cannot produce judgements of value, for it cannot appreciate the teleological element in social life. Secondly, and this is a corollary of the first reason, the psychological point of view is fundamentally individualistic. It can explain social phenomena only in terms of the causal operation of the individual consciousness; it cannot appreciate the social fact in its specificity.

This is evident in the works of such psychologists as Tarde, Le Bon, and Freud. A cursory glance at their writings will help to illustrate the point.

Tarde begins with a plurality of individuals and asks how they come to form a society. He finds the answer in the instinctive tendency of man to imitate.[2] The extreme one-sidedness of this theory is at once evident. It is precisely the opposite of that of Durkheim. It lays the entire emphasis on the influence of one individual on another. True, imitation does play a great part in the process of social development, and, as Tarde's most interesting works show, it explains much if we use it as an hypothesis for the study of social behaviour. But it is altogether too simple an account of social facts even for the social psychologist, let alone the sociologist. It cannot explain the heterogeneity of social types.[3] Nor do we get much further if we join the idea of individual invention to that of individual imitation. It does not help us to understand why the individual is the author of acts that will be repeated by

[1] Cf. Vauthier, 'Droit et Sociologie', in *Essais de Philosophie Sociale*.

[2] *Les Lois de l'Imitation* (6th ed.), ch. iii.

[3] Yet cf. Tarde, *ibid.*, p. 77: 'L'hétérogène et non l'homogène est au cœur des choses.'

others. Tarde argues and can but argue in a circle in dealing with this problem.

Le Bon's account of social phenomena is in principle the same as that of Tarde. They are the results of vague psychological forces at work in the individual mind. It is true that Le Bon speaks of a group soul.[1] He says that the group is more than the sum of its members. And his work is mostly an analysis of the reaction of the group on its particular members. But his account of society is, like that of Tarde, individualistic. It is the product of a process of mechanical causation at work in the individual mind, and he accounts for this process by such vague generalizations as the *suggestibility* of the individual, *mental contagion* in crowds, and the like. Le Bon, like many other psychologists, concentrates only on the lower forms of social life which he typifies by the 'crowd'. This accounts a good deal for the simplicity of the causes he assigns to social phenomena. They are certainly very ineffective if we apply them in the study of the higher, organized forms of social life. Le Bon's theories are analyses of primary psychological processes. They do not throw much light on those in which conscious purpose plays a part, and this perhaps explains why Le Bon attributes little importance to the part played by conscious intelligence in social life.[2] The narrowness of his outlook is further testified by the way in which he thinks of the individual as degraded by the process of socialization. He certainly does not think in terms of a social life which is the truest expression of man's nature. This is, indeed, the point of view of sociology. It is not that of Le Bon.

Freudian psychology is perhaps the best example of the inability of the psychologist to explain the social fact in its specificity. Freud has certainly contributed a new chapter to psychological science, but he has not changed, he has rather emphasized, its individualistic point of view. To explain the fact of society he postulates a certain life-force running through us all, the *libido*.[3] He does not mean that this constitutes a social mind or soul in the literal sense. Freud admits the existence of individual minds only. The distinction between individual psychology (*narzissische Psychologie*) and social psychology (*autistische Psychologie*) falls for

[1] *Psychologie des Foules* (17th ed.), Preface.

[2] *Ibid.*, p. 15. Le Bon holds that men differ little in feeling, and more in intelligence (pp. 16–17).

[3] *Massenpsychologie und Ichanalyse*, p. 45.

him within the domain of individual psychology.[1] He never loses sight of the fact that psychology studies the individual consciousness and can explain social phenomena only in terms of it. Accordingly, he discovers the causes of social organization in an analysis of the individual self (*Ichanalyse*). The psychological basis of group life is, according to Freud, the division of self-consciousness into a self (*Ich*) and an ideal self (*Ichideal*). Thus his formula for psycho-analytic investigation is that some object of experience takes the place of the ideal self.[2] Society results from the fact that a number of individuals put the same object in place of their several ideal selves, a fact which always expresses itself by the acceptance of a common leader who incorporates their common ideal. The essence of the whole process is summed up by Freud himself when he says that the members of a group have identified themselves with one another.[3] This illustrates exactly what we have been maintaining, that the individualistic point of view of the psychologist cannot account for the group as a society of different individuals. The unity which is attributed to the group is and can be only the unity of uniformity, and, in so far as we admit such a unity we eliminate part of our data, the fact of individual differences.

Freudian psychology differs greatly from that of Le Bon in so far as it admits an essential difference between primitive, unorganized groups, and organized and artificial groups.[4] The distinction has, however, been borrowed from McDougall. It will, therefore, be better to examine it as presented by the latter. The distinction asserts that in the higher organized groups the individual member becomes conscious of a system of norms governing his social life, and this changes the whole character of the social organization to which he belongs.[5] Conscious purpose comes to play a positive part in its development. McDougall thus touches the vital point in social phenomena, their normative character.

Whatever he says about group life must be qualified by his explicit avowal that he has no desire to claim for Group Psychology the whole province of Sociology.[6] So long as we do so we have, as sociologists, no cause to pick any quarrel with McDougall. We

[1] *Ibid.*, p. 2: '... durchaus innerhalb des Bereiches der Individualpsychologie.'
[2] *Ibid.*, p. 83. [3] *Ibid.*, pp. 87 ff. [4] *Ibid.*, p. 35.
[5] *The Group Mind* (1st ed.), pp. 89 ff. [6] *Ibid.*, p. 8.

must leave the criticism of his psychological theories to the psychologist. But the trouble is that McDougall himself is apt to forget that his theories are psychological and not sociological. Part of his work is given to a criticism of social institutions as realizing or failing to realize the ends of human nature. When he does so the sociologist has a right to step in and remind him of the origin of his theories, the point of view which gave rise to them, and the problems they were meant to solve.

McDougall explains the origin of social organization in terms of the expansion of the individual consciousness from an essentially individualistic or, as he calls it, egoistic state to a social or altruistic state. He views the process of socialization as the expansion of an egoistic, self-regarding sentiment of the individual into a special sentiment which regards the group as a whole.[1] Through this process comes into being a distinctive 'group mind'. McDougall does not mean the kind of collective consciousness admitted by Espinas and Schaeffle. He means by a group mind a system of mental relations. They exist only in the medium of distinct individual consciousnesses, and result from the interaction of the latter. But he gives them the appellation of *minds*, because they constitute a system which develops in accordance with its own inherent laws. As McDougall himself says, he adopts the 'group mind' as a valid conception because it is useful in explaining social facts.[2]

We cannot here discuss the truth of this claim for the purposes of psychology. But we must insist that what is valid for the psychologist is not also, therefore, valid for the sociologist. The latter cannot give priority to one or other element of society. Its individual aspect is just as important for him as its collective aspect. The psychologist necessarily begins with the individual and explains collective life as the result of forces at work in his mind. McDougall's theory of the group mind is the outcome of such a process of reasoning. Furthermore, the psychologist studies actual psychic facts, not their value, as contributing to the social welfare of man. He is not concerned with the problems of sociology. McDougall's theory of the group mind may, therefore, be an adequate hypothesis for the purpose of analysing the social psychology of existing groups. As a judgement of value, it carries

[1] *Social Psychology*, ch. vii; *The Group Mind*, pp. 79, 263.
[2] *The Group Mind*, p. 8.

no weight whatever. McDougall has no right to attribute to it an ideal value as realizing the true development of the individual. But still more has he no right to carry it over into the field of sociological theory as necessarily a proven fact for the purposes of the latter. Psychology has a limited sphere of inquiry; still more limited is that of group psychology. The group psychologist concentrates on the collective aspect of social life. Any hypothesis he may use will consequently be one-sided and incomplete if we confront it with the entire world of social life, complete in all its aspects. Hence, what will be valid for the group psychologist will not be valid for the sociologist. And this, we submit, is the case with the 'group mind', of which McDougall is the ardent adherent.

As we have said, he draws a clear distinction between those lower groups, in which conscious purpose plays no part, and those higher groups, in which it plays a positive part. The essential difference is that in the latter the individual member becomes conscious of himself as subject to a system of norms. We here have a picture of the individual composing those groups with which we have to deal in this work. Surely the key to understanding his social life is much more in the purposes or ends of which he is conscious when he acts in concert with others than in vague generalizations such as the egoistic sentiment and the altruistic sentiment. If consciousness plays a purposive part in social life, then a study of its purposes must be added to the scientific analysis of its processes, if we are to have a sociology which does not merely describe but explains the meaning of society. Such a sociology will enable us to judge of the value of social institutions, their relation to the life of the individual. It will be a true guide to the jurist in his critical appreciation of legal institutions.

We now see why positivism, the scientific point of view, whether in the hands of Comte, Durkheim, Tarde, or any of the psychologists whom we have mentioned, cannot solve the problems of sociology. Besides the scientific problem of analysing the social fact in all its aspects, there is a philosophic problem of synthesizing these aspects. The former is the work of the special social sciences. The latter belongs exclusively to the sociologist. His ultimate interest in social life is essentially synthetic, and since the synthetic appreciation of the entire evolutionary social process is essentially a teleological problem, his interest is ultimately in

ideals.[1] With these the positivist is concerned only as facts. As values they fall outside the scope of his science. It is by some other method that we must seek these generalizations about social life which we may formulate as ideals to guide us in our conscious efforts at social organization. What then is this method and what changes does it involve in the sociology of the positivist?

Durkheim is right in claiming that sociology must have its own subject-matter. But we cannot countenance a sociology which adopts a one-sided view of it. The individual, as a sometimes conscious, sometimes unconscious, purposive agent, is just as much an element in the complete fact of society as the group considered in its entirety. Durkheim gives the former a secondary place and lays all his emphasis on the latter. His hypothesis of the collective consciousness is too one-sided to suit the sociologist. So also are Tarde's 'individual imitation and invention'. We require an hypothesis which will acknowledge both the group and the individual as elements of society. An outstanding attempt to supply such an hypothesis is Prof. Giddings's *consciousness of kind*.[2] He has realized the one-sidedness of Durkheim and Tarde. But his own hypothesis is also one-sided. Its emphasis is on identity rather than difference as the basis of social organization. It is a long way—which Giddings can describe only by the help of artificial constructions—from the simple group determined by such an 'original and elementary subjective fact' as the *consciousness of kind* to the complex system of heterogeneous groups which make up our social world. It is difficult to explain the co-operation of heterogeneous groups on Giddings's hypothesis.

It must, in truth, be admitted that no really suitable hypothesis for sociological inquiry has yet been suggested. Consequently we have two alternatives. The one is to adopt a one-sided hypothesis and do what we can with it. The other is to work with a frankly dualistic hypothesis, which recognizes both the individual and the group as elements in society, while being unable to include them both in one unitary conception. If we are to avoid narrow dogmatisms, if we seek to give as comprehensive an account of the meaning of our social existence as the present state of our entire knowledge will allow, then it is the second alternative that we must choose. The scientific monist will of course object. But his

[1] Cf. *Sociological Papers*, p. 202.
[2] *Principles of Sociology*, pp. 17–18.

objection is overruled by the fact that sociology is not concerned with a scientific analysis of fact but with a philosophical problem of value. The judgements of science are exact because they are made in the light of a deliberate abstraction, the scientific hypothesis. The judgements of philosophy cannot have the same exactness because they are not made in the light of a deliberate abstraction. Its hypothesis cannot abstract, it must synthesize, for it must somehow include an entire world of experience. Its hypothesis is, therefore, necessarily a solution of its problem. In other words, in so far as the solution of its problem is incomplete, so far must its hypothesis fail to realize the synthetic judgement which it seeks. Since the interest of philosophy is co-extensive with life, and since, therefore, its problems can never attain final solution so long as life goes on, the philosopher must necessarily remain content with an approximation to that knowledge which he seeks. This must be the faith of the sociologist, as also of the jurist, both of whom are concerned with judgements of value, philosophical judgements. We cannot expect sociology finally to solve the apparent antinomy of society and the individual, as we cannot expect the jurist finally to solve the antinomy of their claims in the field of juridical organization. But a sincere and diligent study of the respective parts they play in the entire adventure of human social life will enable us to reach certain generalizations by which we may approximate to an understanding of our social destiny. This is the function of the sociologist. From his own standpoint, it is the function of the jurist.

We cannot prolong this excursus into the field of sociological theory much further. More has already been said about the nature and aims of sociology than is perhaps fitting in a juristic work. But the importance of the present chapter is only too evident when we consider that all the juristic theories discussed in the remainder of this treatise are based more or less explicitly upon sociological conceptions. The remaining chapters will indeed be an extension of the sociological and philosophical views put forward here. We will not, therefore, stop to consider the many sociological theories which present themselves to-day. But we cannot overlook the works of two eminent sociologists whose point of view is far in advance of the positivists, Maciver and Hobhouse.

Both these writers recognize the teleological element in social life. Like all sociologists they, of course, admit that society is at

bottom a rational structure. But they do not admit with the positivist that its rationality is definable in terms of cause and effect. For them social life is sociologically intelligible only in terms of an ideal end which it seeks to realize. They consider it as fulfilling some inherent demand of human nature. But neither of them believes that the work of the sociologist stops at recording actual social facts. His real business is to define the teleological character of these facts, those ideals in the realization of which human nature finds its true development.

Maciver works with an hypothesis which, if somewhat indefinite, is nevertheless sufficiently broad to avoid any narrow interpretation of social life. 'Wherever', he says, 'living beings enter into or maintain willed relations with one another, there society exists.'[1] The social is a relationship willed by distinct individuals. He prefers to speak of willed relations rather than purposive or mental relations, for the latter term leads easily to the conception of a group mind which he strongly opposes All social relations are in Maciver's view individually determined.[2] The stuff of which they are made is to be found in the individual. But this does not involve a mechanical and individualistic view of society. It must be remembered that Maciver is not inquiring into causal relations but into teleological relations. Sociology, he says, is concerned with facts as values.[3] Values exist only for consciousness, and the individual alone has a consciousness. Hence the sociologist must explain social facts as values for the individual consciousness. He must treat the world of social relations as manifestations of tendencies rooted in the individual.[4] Maciver thus puts aside two dangerous metaphysical delusions: (1) that relations are in some way independent or outside of the things related in them, and (2) that the type exists somehow by itself 'transcendental' to its members.[5] 'Social relations are simply those elements and functions of personality in each which are dependent on the elements and functions of personality in others.'[6] 'Society is therefore not relations, but beings in their relationships.'[7] Maciver thus avoids

[1] *Community*, 2nd ed., p. 5.

[2] *Ibid.*, p. 22. [3] *Ibid.*, p. 60.

[4] '. . . laws take on more and more, as we pass from pure physics to sociology, the aspect of *tendencies*', *ibid.*, p. 15.

'The bonds of society are in the members of society, and not outside of them', *ibid.*, p. 15.

[5] *Ibid.*, pp. 69–70. [6] *Ibid.*, pp. 71–2. [7] *Ibid.*, p. 72.

the organic theory of society, in so far as he insists on the multiplicity of its self-determining centres. And he avoids the mechanical theory of society, in so far as he does not impose social relations on the individual from without, but treats them as expressing the inherent functions of his individuality. We are therefore in cordial agreement with Maciver's sociological point of view. It appreciates what we have termed the normative character of social facts, the teleological element in social life, and it is sufficiently liberal to include the manifest differences and oppositions, as well as the likenesses and unity of society. Above all it appreciates, in its true significance, what we are maintaining in this work, that the unity of the two factors of socialization and individualization is to be sought and can only be found in the living personality of the individual human being.[1]

Hobhouse is also opposed to the conception of the group mind. He realizes that the unity of society is different from that of the individual self, in so far as it requires a plurality of distinct individualities which are not to be found in the individual self.[2] But he does not support a mechanical theory of society. The cause of social growth, he says, is an effort towards harmony. 'This effort proceeds not from a unitary central soul of society but from many finite individual centres of consciousness—as many as there are separate organisms—each pressing towards its own mark with but a basic initial sense of its relation to other centres.'[3] Social relations thus express the inherent requirements of the individual. They are not something *sui generis* and different from the facts of individual life, but of the same genus. The individual is by nature social, and in living his own life he operates as a member of a society.[4] Hobhouse therefore sees nothing ultimately irreconcilable in the apparent conflict of social interdependence and individual self-determination. It is in terms of a co-operation rendered necessary by the requirements of the individual personality that he seeks to define the social system in which their dualism is overcome. He is thus concerned with the definition of social ideals or

[1] *Vide supra*, Introduction. *Vide* Maciver, *ibid.*, p. 331, 'In space, in externality, the larger circle includes the lesser, but in the world of community it is the near relation which includes the wider.'

[2] *Social Development*, p. 181; cf. *Metaphysical Theory of the State*, pp. 131–2, 125.

[3] *Social Development*, p. 147; cf. *Metaphysical Theory of the State*, p. 50, '. . . human individuality is and remains something ultimate.'

[4] *Social Development*, p. 67.

values, not merely with the observation of social facts.[1] He maintains the necessity, as of course the possibility, of a rational synthesis in which the mind goes beyond the realm of social facts, and projects into a realm of ideals which give those facts a meaning. His point of view is essentially teleological.

Before summing up the conclusions implied in the above discussion, we must first say something by way of self-defence against unreasonable criticism. The reader will doubtless have become somewhat suspicious on account of certain apparently contradictory assertions which we have made. We have criticized Duguit and the entire positivist school for their individualism. Yet we have approved of Maciver's and Hobhouse's view that human individuality is something ultimate. We have objected to Durkheim's 'collective consciousness' and McDougall's 'group mind'. Yet we have insisted above all that society is something other and more than a system of mechanical relations between atomic individuals. In short, we have stressed this element at one time, that at another, and have, therefore, probably appeared contradictory on more than one occasion. Before attempting to dispel this impression by a clear statement of our own sociological point of view, we would offer this warning to those who expect too much of the sociologist. The only true non-contradictory sociology would be one in which the social problem is finally solved, in which the antithesis of socialization and individualization is finally overcome. But such finality is not within the reach of the sociologist. His very problem is infinite, for the object of his interest, society, is infinite. He studies a world which is ever changing and giving a new content to its varied phenomena. Hence his sociological theories cannot possess absolute finality.

This is frequently overlooked by those who accept a rationalist logic, and distinguish between a changing empirical world and an unchanging world of eternally valid principles. These thinkers err in that they do not take into account the limitations of discursive thought. Thought, in abstracting, as it must, from experience, loses sight of the unique individual. Indeed, the more comprehensive our thought grows, the further do we wander from the unique individual. It is only at the expense of excluding the latter that our thought can take on the complexion of absolute finality. But such a course would not lead to the solution of any

[1] *Ibid.*, p. 93.

sociological problems. It would merely put them aside. Just as there can be no finality in metaphysics, for the unique individual must ever continue to knock at the gates of its closed system, so there is no final social unity for the sociologist to define, since the individual will ever introduce new disharmony into it and create the need for social reconstruction. This relativity of sociological theory to our present evolutionary state must never be overlooked. It does not mean that sociology simply describes that state. Its business is to give a rational account of the general *tendencies* of society, of that nature which it is evolving. But its theories, however sound, are never absolutely final. They are theories for the near future, nothing more. Some day other theories will be called for. But the former are final for the time being; they are relatively final. Sociological theory, then, must remain a contemporary theory, contemporary with the actual social world on which it is a reflection. And indirectly sociological theory destroys itself, for it defines a society which, when realized, will present the sociologist with a new society to reflect upon, a society with new tendencies to be discovered.

The antinomy of society and the individual can thus be only temporarily or relatively solved. Sometimes it may be necessary to stress the one, sometimes the other, when dealing with the tendencies of particular societies. But even such adaptation to the particular circumstances of any society does not produce a theory which absolutely reconciles the unique individual with the social whole. Only by the help of an abstraction can we attempt to do so. But even in any number of such abstractions we cannot completely exhaust the nature of the unique individual. This is not a criticism of sociology. It is simply an inherent incapacity of discursive thought. But sociology can approximate to such an exhaustion, and that is its real function. It follows that any sociology which recognizes the necessarily relative character of its judgements, which attempts to accommodate itself to the evolutionary world of social life and to avoid any rigid, abstract dogmatism, will not entirely do away with an antithetic relation between the various elements of its subject-matter. This we have already observed in the fact that no satisfactory hypothesis has yet been suggested for the purpose of sociological inquiry. We may add that no entirely satisfactory one will ever be suggested. The antithesis of socialization and individualization can never be overcome in relational

thought. It can be overcome only in the concrete living experience. Thought can help us to construct a social world in which that experience may be had. It cannot itself supply that experience. We would, therefore, issue a warning to those who scoff at every antithesis not perfectly reconciled. They ask more of the sociologist than he can possibly give. Let them judge his work in the entirety of its many, varied judgements, rather than each judgement separately. Let them, so to speak, see each tree from the point of view of the wood. Then will the sociologist have a fair hearing and his work the richest appreciation.

The foregoing remarks would in themselves appear to imply a scepticism, not to say a profound pessimism. So they would, if they were supposed to present the entire truth. We have merely been insisting on the limitations of relational thought in overcoming the antitheses of our social existence. This does not mean that we deny the possibility of anticipating our social evolution, and of effecting a harmony of its antithetic elements in the concrete experience of social life. We only deny that this can be achieved in any merely intellectual synthesis. In the living social experience alone can it be realized. To anticipate this experience we must first fill up the gaps left by relational thought; we must individualize the universal. This is outside the scope of purely relational thought. It is effected in the technique of practical life, where we must admit the play of intuitive consciousness, which perceives immediately the meaning and purpose of the actual experience of the moment. This intuitive process does not translate itself as philosophy or science, but as art. It is thus only in the *art* of living socially that the warring elements of our social existence can be ultimately reconciled. This art is practised by us all in the course of our social life. It is, however, those who are specially talented in it that make the best social organizers. Above all is this so where the problem is one of juridical organization. It is in the technique of legal construction, as distinct from the general principles of jurisprudence, that this 'art' finds its most delicate expression. But this part of juristic and social work is outside of our present interest.[1] We shall return to the definition of our sociological point of view.

The sociologist must begin with his actual experience of the

[1] Cf. Gény's profound discussion of this point in his *Science et Méthode en droit privé positif.*

social world. Prima facie, it appears to him a pluralistic collection of distinct activities. He sees men working for purely economic ends with a bare minimum of other interests in the process. He sees these same men at other times transformed into a group of law-abiding citizens. At other times he sees them the victims of crude psychological forces. And he sees them at times identifying themselves more or less exclusively with a host of different interests or aims carried into organized execution by various corporate organizations. Thus, over and above the plurality of the unique individual human beings, he sees a plurality of unique corporate organizations. This is one side of the dualistic data which a prima facie view of human society presents, and the sociologist must take it up in its full significance. Just as the universe has to be divided up into separate departments for the purpose of man's knowledge, so society has to be divided up into distinct groups for the purpose of man's social life. *Divide et impera* is as much a social as an intellectual watchword. The reason for this differentiation of society is twofold. Firstly, it is the consequence of the uniqueness of the individuals who make up society. The separate groupings of individuals for different purposes takes place because these individuals differ in their interests, never completely coinciding in them. Secondly, it is also largely a matter of practical expediency. Even if all individuals did pursue every human interest, practical expediency would necessitate their decentralized administration. Even if the modern world were made up of the citizen who made up the ancient city-state, the very economic demands of its vastly increased population alone would necessitate a more complex administration.

The psychological basis of this differentiation of society is strikingly explained by the modern psychological theory of the different selves that go to make the individual personality. It lays stress on the fact that man is not a simple but a very complex being, and that, though he is capable of unification in his mental life, in the normal course of that life he brings into prominence now one, now another, department of his personality or mind. And the important point is that when this happens his conscious life, at all events, is abstract and one-sided in the sense of pursuing a narrow aim to the exclusion of all others, and the underlying unity of his personality is of secondary importance so far as the relations of his activity to society as a whole are concerned.

'Charity begins at home' is the spirit of commerce. Law allows no latitude in the pursuit of human aims. Social psychology knows but its own potency once it has begun to work. This is one side of the dualistic panorama that a prima facie view of society reveals.

The other side is the unity of society in and through all its plurality of individuals pursuing different interests. However divided the mind of each constituent individual of society may be, and however much society may be cut up into groups exclusively pursuing narrow ends, yet the fact remains that society does continue as a whole. It does manifest a certain unity, a certain ultimate unification of all interests, even though it remains merely tacit and is a matter of degree.

This is the sociological problem. What is the nature of this unity? How does it include the diversity of humanity? To stop at a mere plurality and deny the possibility of unity is to give up the problem and to overlook the fact that there *is* such a thing as social unity. Nor is it any solution of the problem to deny the differences within society and the very real opposition they involve. To say that it is merely phenomenal, and therefore not real, is either nonsense or the judgement of some mind other than human. In either case it does not concern us. Now, the sociological problem is to discover a unity which allows for the differences in men and permits of their richest expression. These differences, when organized in the form of corporate organizations, are social abstractions from the point of view of the sociologist, just as the hypothesis of physical science is an intellectual abstraction from the point of view of the metaphysician. The important point to bear in mind is that they are *qualitative* differences, that they differ not merely in the numerical extent to which they absorb individual men or in the degree of complexity which they exhibit as organizations; but that they differ in the *kinds* of human interests which they foster and promote. This is why in the actual life of society they must be granted a relative independence and self-determination. This is then one necessary term in the social syllogism. The other term is the ultimate comprehensive unity of social life. We cannot sacrifice either the one or the other in looking for our middle term. It is certainly no solution to seek it in some huge plan of absolute centralization which would break down and destroy the differences of men; social life, in the real sense, would

disappear, and where self-conscious life had once flowered an automaton would rule over a lifeless world.

The psychological basis of the relative independence of organized social interests is, as we have said, the capacity of the individual to dissociate his personality into several distinct selves. He is now a business man, now a father, now a mason, now a town councillor, now a member of his golf club. And in each of these capacities he appears respectively as essentially a business-man, a father, a mason, a town councillor, and a golfer. Yet these 'selves' are all expressions of one individuality which underlies and comprehends them all. More often this individuality remains merely tacit, as is generally the case in the broad division of the religious self and the commercial self. But it is always the same individual seeking satisfaction in all these spheres, and in his own mind a constant compromise is being established between their demands. Business interests may require his resignation from the town council, his masonic duty may cause friction with an inquisitive wife, the pleasure of his children may deny him the pleasure of his golf. Thus the groups which foster these interests come to be associated, not through any kindred interest, but through the presence of their claims in the mind of the same individual. All social interests come to be interlaced with one another through the demands they make on the same persons.

All the individuals of a society do not of course belong to all its institutions and organizations, but that society continues and exhibits some degree of unity only through a chain of connexion in the minds of the totality of its members. The middle term of the social syllogism for which we have been searching is thus the individual. Social unity and solidarity, as well as the diversity of social life, have their basis in the individual human being, the individual member of society. The fostering and promotion of that unity and solidarity lie not in the suppression of the individual but in the education of his self-consciousness. Nor does it lie in the breaking down of the relative independence and self-determination enjoyed by the many distinct groups which make up society. This is the fallacy of the absolutist juristic view of the state which neglects the extra- or supra-legal sanctions of law, social sanctions. The promotion of real social solidarity lies clearly in some compromise between the centralization and decentralization of authority. Guild socialism and syndicalism have both attempted to do this.

But in decentralizing the life of and authority in society they have erected a plurality of sovereign and exclusive spheres of social life. They have substituted anarchy for state despotism. Decentralization does not mean the absolute severance of classes of individuals according to some predominant interest. It means the greater self-determination of the individual as the self-conscious representative of a group of interests. Of the juristic problems which arise here we shall have occasion to speak later. The guiding principle of good legislation is clearly to decentralize social life so as to render it possible for the individual to make himself felt as a real constitutive part of the institutions which embody his interests.

The sociological theory which we have here put forward lays great emphasis on the interests, especially on the plurality of distinct interests, of the individual member of society. But it has not made these interests the only factor in social life. It has laid equal emphasis on the personal qualification which those interests have in the mind of the individual. They are *his* interests, and here we have the foundation of social solidarity as also of all social progress. The *élan vital* of society is personal effort to realize interests. These interests require social co-operation for their realization. The logic of human life is thus the logic of social life. The reverse is equally true. The logic of social life is the logic of individual life. But we must beware of misinterpreting this statement. That man is essentially a social being is true in the sense that only in and through society can he realize his aims and interests. But that man is purely altruistic is a fiction which the sociologist must avoid. We have, therefore, avoided an individualistic theory which treats individuals as essentially indifferent to each other and an exaggerated collectivism which recognizes a group mind or person transcendental to its individual members. The relation of these two aspects of all social phenomena will be the main theme of all the juristic discussions in the following chapters.

But we are still far from the solution of those juristic problems of which this work treats. It is not simply a question of carrying our sociological theory over into the field of law. Sociology and jurisprudence are, as we have already shown, two distinct departments of thought. They are intimately related, but they must not be confused. Such a confusion leads to the confusion of social life with its juristic character as expressed in legal norms. The result will then be an inadequate social theory like that of Duguit or a

'metaphysical' theory of law like that of Hegel. Law is always bound up with social fact. It is an interpretation of it. The foundation of juristic theory must, therefore, be sociological. But the essence of juristic theory lies in what is built up on those foundations. Sociology studies the teleological character of social life. Jurisprudence studies the latter in terms of the realization of order and justice. It gives us judgements about social life according to certain abstract principles. It seeks to determine how we must think of the realities of social life in order that they may function in an orderly and just manner.

We shall now end this somewhat lengthy excursus into the field of sociological inquiry. As we shall see, it has been necessary. In addition to preparing the way for our own theory of corporate personality, it will help us to understand more clearly those jurists whose theories we are about to discuss. For they are all agreed upon two points. Firstly, they all admit that the foundations of law are social, and that jurisprudence must therefore have the support of a sound sociology. Secondly, they do not, like Duguit, confuse jurisprudence with sociology. We have, therefore, given the third part of this treatise, in which their theories are discussed, the title of 'Juristic Theories'. But though they agree on points of such fundamental importance they by no means agree in their solutions of juristic problems. In our efforts to find the reasons for this the discussions in this chapter will, it is hoped, prove of value.

PART III
JURISTIC THEORIES

I

THE THEORY OF THE REALITY OF CORPORATE PERSONS: OTTO VON GIERKE

Fiction Theory rejected — results of previous discussions — the 'fictionists' and the 'realists' — Otto von Gierke — his attack on Roman jurisprudence — *Prinzip zur gesammte Hand* — the *Genossenschaftstheorie* — *Sozialrecht* — Gierke's theory of the state — its organic character — his theory of the reality of corporate persons — difference in legal treatment of individual and corporate persons — state sovereignty — state and the objective law — social sanctions of law — jurisdiction of state over corporate bodies — summary of Gierke's jurisprudence — its character — its relation to Roman jurisprudence — its great service — its aim — its confusion of social and legal issues — Gierke an adherent of the *Willenstheorie* — results when he comes to deal with the relation of the state to corporate bodies — Gierke's theory of the state and the Hegelian theory — Gierke's psychological realism later displaced by an abstract rationalism — results of the change — reasons for it — Gierke's failure to carry out the directions of the *Prinzip zur gesammte Hand* — his confusion of *de jure* and *de facto* personality — error in his logic — law and society.

WE have seen in the first chapter how the Fiction Theory and its complementary Concession Theory lead to juristic constructions untrue to the living society they are meant to fit. They are the result of a rationalistic logic working on an *a priori* conception of society. It is, however, not merely a theoretical inconsistency that leads us to reject them. It is because that theoretical inconsistency reaches right to the domain of practice, where it perverts and destroys the essence of true legal organization, that we have laid and must continue to lay the greatest stress on the objections to it. The ultimate interest of jurisprudence is legal practice. Its efforts are directed to the guidance of that practice, for it is just the demand for a truer practice that prompts the reflections of the jurist. In rejecting the Fiction Theory, therefore, we are rejecting not merely an abstract conception, but an untrue account of the reality with which the practical lawyer has to deal.

There are, indeed, few political philosophers and jurists, as distinct from practising lawyers, who will not admit the falseness and grave dangers of the Fiction Theory. But there are some who will point out that it has not always been taken quite as seriously as we take it, that it has been a simple device of the lawyer which he has not failed to disregard under pressure of practical necessity. As Saleilles has shown, this was largely true in Imperial Rome and

during the Middle Ages. But since the seventeenth century the growing demand for logical consistency in the law, coupled with the rise of the sovereign state and the distrust of associations introduced by the French Revolution, has led lawyers to accept the Fiction Theory and the Concession Theory as almost axiomatic. Even if these same lawyers knew that their theories rested on a deliberate fiction, the fact remains that they wished to treat legal phenomena *as if the fiction were true*. The sway of Savigny in Germany and France, the universal acceptance of Austinian jurisprudence in England and America, are sufficient proofs that this was the case in the middle of the nineteenth century. Even if it can be shown that legal practice has not always been bound down to the strict and literal application of the Fiction Theory, this cannot be considered as a plea in favour of the theory. If it is to become the habit of lawyers to depart from the plain meaning of the law, to go behind the scenes of the legal platform for the realization of that order and justice which law is supposed to introduce into social life, then it is inevitable that our respect for the law must deteriorate and the jurisdiction of our judges become arbitrary and a sham. When the law is such that it is found impossible to apply it without wilfully disregarding what are undeniably social facts, then it is time to examine that law critically, to search its very foundations, and, if necessary, to reconstruct them so as to support a juristic system which fits the facts of our social world. This is what we have found it necessary to do and are now doing with the classic Fiction Theory and the theories of law and sovereignty which it implies.

The result of our investigations, whatever else they may involve, is certainly to make it clear that we should drop the term 'fictitious' when referring to the juristic personality of a group. That we are here concerned with a social reality has been the emphatic assertion of all our previous discussions. But though the change, compared with the view of the Fictionists, is fundamental, it is far from being a settlement of the vexed problems connected with the Doctrine of Corporate Personality. The jurists whom we are about to discuss almost all speak of the 'reality' of the corporate person. Yet in spite of this common denominator they differ in respect of what they mean by this 'reality'. Nor are their differences merely technical or terminological. They are differences of theory which involve serious differences for the working of any legal system.

Thus we have only found our way to the highroad of juristic thought; we have still to discover where it leads. One thing, however, the Realists all admit in opposition to the Fictionists—and it is a great advance—that jurisprudence must have its foundations in sociology, for the content of law is social fact, and the form of law cannot be determined apart from its content. The jurists whom we are about to discuss are in this sense all sociological jurists. But the class is a wide one, and within it we find a great diversity of sociological theory and juristic construction.

So varied and voluminous is the literature of this class of jurists that it is extremely difficult to achieve a bird's-eye view of it. For the sake of clearness, as well as tolerable brevity, we will restrict our discussion to the works of certain jurists which may be said to represent the main currents of the juristic debate about corporate personality. But even thus it is difficult to maintain an easy continuity in the presentation and criticism of their respective theories. In this matter we must frankly plead for the reader's indulgence. The only intended connecting link between the succeeding chapters will be the writer's own account and solution of the problem, and these it is hoped will become progressively clearer in the course of his criticisms.

The best known advocate of the reality of corporate persons is Otto von Gierke. This is so not only because of the scholarly wisdom of his writings but also because of the important position he occupies in the history of modern juristic thought. Every thinker is to some extent the creature of his time with its traditions of the past and views of the present. Of no one is this more true than of Gierke, who came as the apostle of an old theory which was forcing its way into recognition and as the reactionary against a yet older theory which still held great sway. The theory he opposed was the Roman theory of the *persona ficta*. In its place he sought to revive the old Germanic conception of the *reality* of the group-entity. Now, we must beware of attributing a shallow motive to Gierke. His aim was not merely to quarrel over the word 'fictitious'. His own theory is a challenge to the entire basis of Roman jurisprudence. The Fiction Theory is but a deduction from an individualistic jurisprudence, and it is this that Gierke sought to uproot at its very foundations.

Gierke sought a more adequate conception of corporate being. He felt the need for a new theory of partnership (*Gesellschafts-*

theorie) and a new theory of community (*Gemeinschaftstheorie*). Roman jurisprudence had allowed the *societas* and the *universitas* to grow apart, until it became impossible to comprehend them as phenomena of a single social world, except by means of crude fictions. It could not sketch society as a legal organization without producing a caricature of the facts of social life. Between the omnipotent state and the single individual it could see nothing but a collection of artificial juristic constructions. It is just here, in its failure to supply a theory which brings the individual into essential relation with society, that Gierke discovers the fundamental weakness of Roman jurisprudence. Such a theory, however, he finds embedded in the old Germanic conception of the group hand—*die Gesammte Hand*. With this conception as its ruling principle, he develops a new theory of association, the *Genossenschaftstheorie*, which views the corporate body as a real group person (*reale Gesammtperson*) in opposition to the phantom notion of a *persona ficta*, which was all that Roman jurisprudence could offer.[1] The extent and importance of this new theory are vigorously emphasized by Maitland, Gierke's English exponent. 'The new theory was to be philosophically true, scientifically sound, morally righteous, legally implicit in codes and decisions, practically convenient, historically destined, genuinely German, and perhaps exclusively Germanistic.'[2]

The crucial point in Gierke's theory is that corporate organizations come to be as the result not of a creative act of the legislator but of a living force, of 'historical or social action.'[3] The kern of the associative movement is not the idea that it is giving birth to a legal situation, but that it is an organization of life. 'We demand *recognition* by the state because we demand *recognition* by the Law.'[4] The function of the state in dealing with the existence of legal associations is one of recognition, not creation. But Roman jurisprudence would lead us to maintain that, in the state, that alone is valid which the state recognizes as valid, and that, therefore, the state possesses the right of granting or withholding corporate rights (*Verleihung der Körperschaftsrechte*). It follows that every-

[1] *Die Genossenschaftstheorie*, p. 5.

[2] Gierke's *Political Theories of the Middle Age*, Maitland's Introduction, p. xxv. The claim that the notion of the reality of corporate persons is purely Germanistic cannot, of course, stand in the light of recent historical research.

[3] *Die Genossenschaftstheorie*, p. 24, 'geschichtlichen oder socialen Tat'.

[4] *Ibid.*, p. 18.

thing depends upon the legal recognition of the association as a 'juristic person'. This deduction Gierke strongly opposes. The state, he maintains, can only be the Organ of the Objective Law,[1] and this has its foundation in social fact. Even if the state is in a position to bestow the peculiar attribute of legal subjectivity (*Rechtssubjektivität*), it is quite unable to produce the actual foundation (*Unterlage*) of this attribute. Here, then, we have the limit of its activities. It cannot produce the will to do any more than the conditions of willing. 'Law can approach persons only from without (*von aussen*).'[2] Its function is thus not to create, but merely to declare what social facts conform to the requirements of the law. When, therefore, it recognizes a group as a corporation it does so, not because it has in any way created it, but because that group contains *in itself* all the qualifications that law demands of a corporation. Thus Gierke admits the *de facto* personality (*tatsächliche Persönlichkeit*) of associations. German law, as he shows, is tossed between the Roman view and his own view, getting no further than a half-way house between the 'reality and fiction, being and not-being of corporate personality'. He pleads for a new doctrine in place of this hybrid view that 'can neither live nor die'.[3] He would introduce new legislation which recognizes corporations as free because they are in fact freely produced, a legislation which recognizes that they do not acquire corporate personality or legal subjectivity by virtue of a grant from the state, but possess a *de facto* personality which the state merely declares to be a fact.[4] This is what he would substitute for the current view that the individual human being is the only legal subject in its own right (*selbständiges Rechtssubjekt*), and that the rights of corporate bodies are special privileges granted by that sole repository of all rights, the state.

To make Gierke's meaning clearer let us follow his account of the process of legal incorporation. He bids us distinguish carefully between two distinct questions: the one as to the existence of the legal statute which recognizes the personality of the corporation, the other as to the source of the power attaching to this statute in so far as it declares a legally valid *modus vivendi* for the corporation.[5] The legal statute exists as a general statement

[1] *Ibid.*, p. 22, 'Organ des objektiven Rechts'.
[2] *Ibid.*, p. 23. [3] *Ibid.*, p. 75. [4] *Ibid.*, p. 79.
[5] *Ibid.*, p. 114, 'Person geltenden Lebenswesens'.

whether in written or customary form, and it certainly has an existence prior to the foundation of any corporate body to which it is applied. Of such a corporate body it demands more than the mere fact of its birth; it demands also its legitimate birth.[1] As soon as legal requirements are fulfilled the corporate body is legally a juristic person. 'But', says Gierke, 'there is no creation of the corporate person behind the creation of the corporate fact or existence.'[2] The work of the state through the medium of the statute amounts simply to that of declaration so far as the validity of the corporation *quâ* subject of right is concerned. This is also the case where the juristic personality of the corporate body is validated by a special statute passed for the occasion. We have here no constitutive or creative *lex specialis*, but the application of a new general rule.[3] The 'granting' of personal status is simply the application of a general rule to a particular, suitable case. It has only a declaratory, not a constitutive significance for the legal subjectivity of the corporation. So much for Gierke's view of the function of the law in regard to the legal existence of corporations. In this part of his jurisprudence he clearly puts aside the entire legal fiction of 'creation' and departs fundamentally from the main tenets of Austinian jurisprudence.

It is in answer to the second question, as to the source of the power attaching to the statute which declares the legal subjectivity of the corporation, that Gierke brings out the peculiar character of his *Genossenschaftstheorie*. He views the proceedings by which a juristic person is born not, as Roman theory viewed it, as the process of relating the several rights of so many individuals (*individualrechtliche Verhältnisse*), but as the process by which the legal subject, the corporate person, is coming to be. Thus he maintains that in estimating the constitutive importance of these proceedings we must consider them from the point of view of law which relates to the claims of society (*Sozialrecht*), not law which relates to the claims of individuals. From this point of view alone can we answer the question as to the productive source of the power attaching to the statute which declares the legal personality of a corporation.

This point of view is not new to us. We have met it among those

[1] Contrast the case of the individual human being for whom the mere fact of birth calls forth the legal recognition of his personality.

[2] *Ibid.*, p. 115.

[3] *Das deutsche Genossenschaftsrecht*, vol. iii, pp. 142, 143.

sociologists whose point of view is essentially collectivist, and who study society as a unity differentiating itself. Gierke considers the sociological structure of corporate bodies from the same angle. Thus he discards any attempt to explain the existence of corporate bodies in terms of contracts between their members. In itself the production of a corporate body is something more than a social contract. Corporate bodies do not rest on a basis of mere agreement but on the basis of a constitution (*Verfassung*). True, the original agreements between the members of the corporate body belong 'on one side of their being' to the law of contract. They are, however, at the same time elements of the creative act (*Elemente des schöpferischen Aktes*) which calls into being the bearer of a general or social will (*sozialer Willensträger*). The individuals in giving up some of their freedom gain the status of the group of which they declare themselves members.[1] Thus, looking back from the corporate body to the time when it did not yet exist, we see so many free individual wills in legal relation; looking forward from the time when the corporate body does not yet exist to the time when it will, we see it as the single activity of a self-constituted organism. We must, says Gierke, realize the change that the individual undergoes when he becomes a member of a corporate body.

The foundation of the corporate body is thus not an agreement, but a joint, one-sided or unilateral act (*einseitiger Gesammtakt*) which has no parallel in private law or law relating to the claims of individuals. It is the developing and incorporating will of the growing community which affirms itself in this very act. We must, therefore, consider the process by which the corporate body comes into being from its first conception to its perfect realization as a unitary act. The separate acts of its members are dependent moments (*unselbständige Momente*) or elements in a collective movement which has one centre and one end (*Ziel*).[2] Gierke thinks

[1] *Die Genossenschaftstheorie*, p. 132. This suggests strongly the influence of Rousseau, *Contrat Social*, ch. viii.

[2] Gierke says that the law, if it recognizes the completed corporation *as such*, cannot put aside the developing corporation *as such*. The Nürnberger Konferenz considered that the law of contract was sufficient in dealing with the preparatory acts in the formation of a joint-stock company (Aktiengesellschaft), *ibid.*, p. 138. This, says Gierke, was a great mistake. He directs our attention to what he considers a much better and more adequate legislation, the *Novelle* of 11th June 1870. This law went so far as to recognize that the constitution of a modern funded association (Kapitalgenossenschaft) reaches far beyond the

that only by means of this view of corporate life can we appreciate the rights and duties of corporate bodies.

With the disappearance of the absolute antithesis of the individual and the state disappears the absolute antithesis of public law and private law. Gierke's *Genossenschaftstheorie* has its foundation in a *Sozialrecht*, a law founded on the claims of *society*, which considers the organic connexion between the person of the association and the associated persons as throughout necessary and definite. Though the legal sphere of the association is distinguished from that of each member, its members are all dependent on one another and complete each other in their totality. The relations between the whole corporate body and its parts are *real* legal relations because they are based upon actual social relations.

Now Gierke is aware that the legal treatment of corporate bodies is not a simple affair. In it we are confronted by individual claims as well as social claims. The variety in the mixture of such claims is endless, and they present just those difficulties which give rise to Gierke's *Genossenschaftstheorie*. To illustrate these difficulties, we have only to observe how, in dealing with Constitutional Law, we have to take into account certain elements of International Law, and how the law of private associations has to deal with the rights of individuals as well as the corporate rights of associations. Roman theory could not deal with this apparent duality of claims. It offered simply two alternatives, either perfect right of membership in the community or free private right against the community. 'Practice', says Gierke with approval, 'has reacted against the use of this pattern.'[1] German jurisprudence has here come into the foreground. It has not shrunk from admitting that the peculiar interrelation of the public claims of society as a whole with the claims of organized associations, which we got in the old German *Markgemeinde*, has also a place of great importance, and does much work in the modern state. Hence the introduction of the category of the special rights of corporate bodies—*gemeinheitliche Sonderrechte*.[2] This, says Gierke, gave the final blow to the Roman tradi-

law of contract to the region of social law (Sozialrecht). The point of view of contract is surpassed, and we have the point of view of a collective act of will, which alone suffices for the appreciation of corporate life with its legal consequences. This point of view Gierke would apply to all institutions and charitable foundations, with necessary modifications, as well as to all kinds of companies, associations, and corporations.

[1] *Ibid.*, p. 203.

[2] *Ibid.*, p. 205.

tion. It admitted that in between the individual and the state is a series of corporate bodies which are real factors in the juridical organization of society. Far from being creations of the state, they are essential elements of the social reality of which the state is the juristic expression. Moreover, the apparent difference between the special rights of corporate bodies and the rights of the individual, on which Roman theory laid such emphasis, disappears as unreal and non-existent. It has no basis in social fact. It is not a question of the opposition of the collective person to its members, but of a conflict within the single, corporate life of the entire corporate body.[1]

Thus Gierke's *Genossenschaftstheorie* considers the union of the rights of the corporate body (*Einheitsrecht*) with the rights of the individual members (*Vielheitsrecht*) as *organic*. This is the principle in accordance with which Gierke proposes to distinguish the various species of corporate body, i.e. according to the manner and degree in which they attain organic unity.

It is interesting and very important to observe that Gierke finds the peculiar conception, which makes possible and has historically led to the organic interpretation of corporate life, not in the realm of those rights claimed by corporate bodies (*Körperschaftsrechte*), but rather exclusively in that of the rights claimed by individuals (*Individualrechte*). The principle is that of the *gesammte Hand*. The reason why Gierke finds its source in the rights claimed by individuals is clearly this: an abstract union of individuals does not exist. The principle of the *gesammte Hand* first gets a definite content through the special content of the bond which unites a plurality of individuals. We get a corporate sphere out of the special spheres of individuals.

The very essence of the *Prinzip zur gesammte Hand* is, therefore, the idea that a legal association stands or falls with the unity of its supporters. The stability of a financial corporation, for example, depends upon the stability of the unity of its members. 'Actual practice', says Gierke in his review of modern German law, 'has forced above all the recognition of the objective unity of company

[1] Thus, the special rights (*Sonderrechte*) of the individual are in the nature of minority rights (*Minderheitsrechte*). *Ibid.*, p. 267. The special rights of the minority have, it is true, an individual and a corporate aspect, but, says Gierke, they are only aspects of that differentiation which belongs to, and goes on in, the single corporate life of the entire corporate body.

property as a special property (*Sondervermögen*).[1] At the same time it has also forced the recognition of the subjective unity of the company. But it has no sure and stable formula for it. Actual law cannot go beyond treating the owners of the company property as several distinct partners. This difficulty is overcome if we use the principle of the *gesammte Hand*, which recognizes the inherent power of a corporate body, possessed of personal rights, to own property.[2]

Gierke thus treats corporate bodies as real corporate persons —*reale Gesammtpersonen*—which are not merely *legally* competent (*rechtsfähig*) but also really capable of willing and acting (*willens- und handlungsfähig*.[3] Here we have the basic contention of his *Genossenschaftstheorie*. It is in the sharpest conflict with the Roman theory, according to which the 'juristic person' could will and act only as a fictitious person, and be legally competent only by means of representation by a guardian or trustee, just as in the case of children and lunatics. Gierke champions the capacity of a corporate body to will and act as a real attribute given in and with its *de facto* personality. The law recognizes the personality of the corporate body, because it looks upon it as the bearer of a single, independent corporate will. Here, then, as elsewhere, the foundation of legal subjectivity is *will*. But while legal recognition follows upon this capacity to will and act, it does not create it. It merely declares it.[4]

We have here an almost literal assimilation of corporate personality to individual personality. But, as we shall see, Gierke carries it out by surreptitiously changing the categories of his thought from those of psychology to those of a rationalistic philosophy. He drops into the use of the Hegelian conception of will as an ethical value. This becomes plainer in his theory of the state, which we shall discuss presently. We shall first follow his account of the consequences of the *Genossenschaftstheorie*.

In spite of this literal assimilation of corporate personality to individual personality, Gierke finds himself bound to admit a specific difference in the relation of law to the one and the other. The legal recognition of the individual is only co-extensive with his

[1] *Ibid.*, p. 462.

[2] *Ibid.*, p. 353, '. . . vermögensrechtlichen Wirksamkeit einer personenrechtlichen Gemeinschaft'. Cf. Gierke's treatment of the trading company, *ibid.*, p. 465 ff.

[3] *Ibid.*, p. 603.

[4] *Ibid.*, p. 609.

physical body. It sets limits only on his external being. It rules his actions but not his will; it leaves that to morality and religion. But in its relation to the corporate body law does not exhaust its function in a mere external recognition and limitation. It permeates to the inward being of the corporate person. The very building-up and functioning of the corporate will is subject to legal jurisdiction. This it must undergo because, firstly, the inner life of the corporate person is realized through the outer life of its members; and secondly, these members are at the same time in themselves individual or corporate persons capable of willing and acting. Consequently we cannot dispense with the only way of discriminating between those of their actions which belong to the life of the corporate body and those which belong to their several lives as private individuals apart from the corporate body. Hence the law recognizes and defines the limits of the corporate body's capacity to will and act. It does so in two respects.

Firstly, the corporate person may will and act only within that sphere of its corporate life (*körperschaftliche Lebenssphäre*) which the law recognizes. The extent of this sphere is determined by the purpose (*Zweck*) of the corporate body. We observe here, Gierke admits, a profound difference between law relating to the claims of individuals (*Individualrecht*) and law relating to the claims of society (*Sozialrecht*). The latter knows, the former does not know, a limitation of legal capacity to will and act by means of a constitutionally marked out sphere of life (*Lebensbereich*).[1]

Secondly, the corporate body, in so far as it is placed under the superintendence of the state (*Unterordnung unter den Staat*), is bound by the common interests of its members. 'The corporate life is bound by the common life' (*Gemeinleben*).[2] In these two respects the capacity of a corporate body to will and act is limited by the superintending will of the state. Here we come to a fundamental difference between the state and all the corporate bodies within it.

Only the state cannot be limited by a will above it. It cannot be bound in its will and action by a co-operative higher corporate being[3] (*mitbestimmendes höheres Gemeinwesen*). It alone can be a purely sovereign corporate person. Gierke, however, does not relapse into a state-absolutism of the Austinian pattern. The state is for him a real corporate person; that is, a social reality. As a

[1] *Ibid.*, p. 633. [2] *Ibid.*, p. 641. [3] *Ibid.*, p. 642.

juridical organization, it receives its form from its content, which is the world of social fact. Gierke thus derives the law of the state not from the exercise of a formal dialectic but from the inherent character of living society. His theory of the state is simply an extension of his *Genossenschaftstheorie*. As we have observed, all corporate bodies (other than the state) are, according to Gierke, under state-guardianship or state-trusteeship (*staatliche Vermundschaft oder Obermundschaft*).[1] This relationship Gierke finds expressed and justified by the principle of *gliedmässige Einordnung*, or 'participation in membership', or 'incorporation as member'. The limitation of the corporate will of corporate bodies through the will of the state is for him the logical outcome of the participation and incorporation of all corporate bodies in the legally highest corporate body as members (*Gliede*) of it.[2] In the constraint (*Gebundenheit*) of the corporate will of a particular corporate body by the will of the state, it is not a question of the relation of the life of the state to the life of the corporate body, but of the consequences of the relations of a general legal organization for the corporate life of the corporate body itself. The state, says Gierke, can thus organize the willing and acting of corporate bodies while operating on no other ground than that of the idea of law (*Rechtsidee*).[3] The state, therefore, enters only as the formal sovereign legislator for legal order, and so realizes, in its own declarations, an idea of reason which has objective validity, and as such stands over against the state's own willing.[4] Its power of legislation does not carry the power of its will (*Willensmacht*) into other corporate bodies, but makes it merely the highest functionary of the 'Might of Right', which binds and reaches to the inner life of all corporate bodies, including the state itself. Gierke is thus, on his own ground, essentially an adherent of the modern theory of the *Rechtsstaat*, the state governed throughout by law.

Now Gierke never fails in his insistence on the extra-legal, social sanctions of law, and never is he more emphatic on the point than in his theory of the relation of the state to corporate bodies within it. The law of the state is determined by the general will of the entire community which it comprises. But this general will is not an aggregate of particular wills; it is the collective will of a

[1] *Ibid.*, p. 644. [2] *Ibid.*, p. 648. [3] *Ibid.*, p. 648.
[4] Cf. *Johannes Althusius und die Entwickelung der naturrechtlichen Staatstheorien*, p. 319.

single, real corporate person, the person of the community. The state is its juristic expression as a subject of rights. Hence, says Gierke, the state must always champion the general will against the particular will. This function is that of superintendence (*Aufsicht*).[1] This term, however, does not express all that Gierke's theory of the state implies. It does not express sufficiently the absorption of the particular wills in the general will, of particular corporate bodies in the state, which Gierke's doctrine of 'incorporation' involves. The critical examination of this point we must postpone for the moment. Let us merely note Gierke's own emphasis on the organic unity of all wills in the will of the state.

The state, he observes, is not merely called upon to superintend but also to determine the purposefulness and legality of the activities of corporate bodies within it. A peculiar characteristic of the state's interest here is that it aims at a negative relation of itself to all corporate bodies within it. In this respect the state grasps the totality of corporate life in so far as it watches, in the public interest, that corporate bodies do not overstep their respective limits, and that other bodies do not interfere with them. But the state can also direct itself to the production of a positive relation between corporate bodies which are placed under its jurisdiction. In this direction, says Gierke, it grasps the totality of corporate life in so far as, in the public interest, it has to assure the fulfilment of at least the essential part of that purpose (*Lebenszweck*) for which it exists.[2]

But again, consistently, or inconsistently, Gierke is no 'concessionist'. His theory of the reality of corporate persons, of their original and inherent capacity to will and act consciously as collectivities, has once and for all broken with the idea that their legal existence is conceded and derivative. Thus, he says that out of the laws which regulate the negative and positive relations of corporate bodies to one another by means of a higher corporate being there arise subjective rights and duties which are in the last resort the outcome of two distinct and fundamental personal rights: firstly, the right of the corporate person of the higher corporate body (the state) over its constituent members; secondly, the right of the corporate person of the lower corporate body to self-determination on the ground of the freedom of its own personality. From the point of view of the 'subjection of juristic persons to the state' the

[1] *Die Genossenschaftstheorie*, p. 652. [2] *Ibid.*, p. 657.

former is called Corporate Sovereignty (*Körperschaftshoheit*), the latter the Right of Self-Administration (*Selbstverwaltungsrecht*).[1] Thus Gierke is always on the watch for preserving a free juridical life for corporate bodies within the state. His whole *Genossenschaftstheorie* is born of a passionate dislike of the Romanist Concession Theory. But whether his theory of the state as a real organism can consistently admit this freedom of its constituent members is a question that will figure foremost in our criticism of his jurisprudence.

It will be well, before proceeding to examine Gierke's theory of corporate personality critically, to sum up the essential points in the above exposition of it.

Gierke has given us a new formula for the juristic interpretation of human association in all the variety of forms that it can assume. It grants the corporate body, which results from the conscious acts of will of individual persons, a real personality distinct from the several personalities of its constituent members. This personality is not merely a juristic conception but a social fact. Its origin is, strictly speaking, extra-legal and lies in 'historical and social action'. Law must recognize this personality as a legal subject, because it is such in its own right, by virtue of its actual, living nature. The function of law is merely to declare it. The old Roman individualistic conception of society is, thus, cast aside. In its place Gierke has put an organic conception. Individuals are no longer exclusive units. They are capable of sinking their peculiar idiosyncrasies in the interest of a common life. And what is more, these individuals are no longer indivisible units. They are capable of sharing, of being absorbed in the corporate life of more than one corporate body, and at the same time remaining in other respects private persons.

The clue to the source of real corporate unity is the contractual will of the individual. The corporate willing and acting is coextensive with the content of that contractual will. Its sphere is that of the common interest for the promotion of which the corporate body originally came into being.

Corporate bodies may also have other corporate bodies as their constituent members. This is a necessary item in Gierke's conception of the organic unity of society, for in this way all corporate as well as individual persons come to be organically interrelated.

[1] *Ibid.*, p. 672.

The highest corporate body, which in the last resort includes all others, is the state. The state is the supreme functionary of the law; but we must beware of thinking that it creates those very subjects to which the law applies. Persons, whether individual or corporate, are living beings which the law does not create but merely declares as being in fact (*tatsächlich*), or in their own nature, subjects of rights and duties. Thus the foundation of legal rights and duties, the ultimate sanction of law, is extra-legal or social. The state is simply the authoritative interpreter of the social conscience as found embodied in living realities.

Last, but not least, we must bear in mind the extreme elasticity of Gierke's *Genossenschaftsprinzip*. The Roman *societas*, apart from the defects it inherited from the individualistic system that gave it birth, was absolutely formal and rigid. It left an unbridgeable chasm between itself and the *universitas ipsa*. Gierke's *Genossenschaft* is a type intermediate between the two. It is a wide and comprehensive conception of corporateness which allows a series of corporate bodies ranging from the perfect corporation almost to the Roman *societas*. The criterion which Gierke uses for distinguishing between them is the distinction between the corporate body as a *subject* of right and the *societas* as a *relation* of the several rights of so many individuals. The graduated series of corporate bodies which the *Genossenschaftsprinzip* gives us is, however, so fine, and shades off into the realm of the *societas* so imperceptibly that it is very difficult to draw the line between them. The *Genossenschaftsprinzip* possesses an extraordinary elasticity, and, in opposition to critics who think it a weakness, Gierke considers this to be one of its chief merits.[1]

It is essential to know exactly from what point of view Gierke offers his theory as a solution of the social problem. Is he speaking purely as a jurist? Or is he also tackling the problem of social philosophy? On this point he gives us no direct information. The answer must rest with the interpretation of his writings, and in this we cannot do better than follow his disciple, Maitland, who attributes to him a theory not merely of the legal but also of the moral and social nature of corporate life.[2] Gierke, of course, begins with the problem as it confronts the lawyer, and would have no interest in the *Genossenschaftsprinzip* if he did not see great prac-

[1] Cf. *ibid.*, p. 308, n. 1, in which Gierke replies to the criticisms of Laband.
[2] Cf. quotation from Maitland *supra*, p. 140.

tical benefits to be derived from its use as a legal formula.[1] But he certainly treats this principle as more than a mere working hypothesis for the lawyer. Corporate personality is for him a social reality and the principle which explains its nature a social principle. Gierke thus offers us no less than an interpretation of concrete social life.

But some would eagerly question this view, asking whether Gierke is not a jurist, and whether it is not, therefore, a misinterpretation of his work to say that he is interested in any other problems than those of legal science. The validity of this objection, of course, depends upon Gierke's own conception of the juristic problem and his own solution of it. The juristic problem, for him, is to discover the basis of those rights and duties which law recognizes as belonging to various kinds of persons, and the source of that authority and power to protect and enforce them, which the state possesses in its capacity as the highest functionary of the law. And it is just his solution—namely, that the ultimate sanctions in both cases are extra-legal or social—that makes the basis of his juristic system a social philosophy or sociology. For Gierke, juristic problems are *social* problems, and his solutions of them are theories as to the nature of *social* life and organization. As we have observed, Gierke's inspiration comes from old Germanic law, which treated legal relations as immanent within the social organism. He thus studies law as a social fact and not as the product of an abstract dialectic. Juristic conceptions, if they are to be valid from the juristic point of view, must be also socially true; that is, they must be true accounts of the social realities with which all law is ultimately concerned. Gierke, as we shall see, assimilates the problems of jurisprudence to those of social philosophy or sociology to the point of confusing them. It is this confusion which accounts for his support of a social theory which is sociologically false, and a juristic theory which does not meet the peculiar requirements of the jurist. To anticipate our criticism, his social theory suffers from being too juristic, while his juristic theory suffers from confusion with social theory.

To appreciate Gierke's thought we must note carefully just how much he is a revolutionary in the orthodox Roman camp and how much he still accepts of its juristic theory. He holds that law addresses itself to persons and to persons *only*. The qualifications

[1] *Ibid.*, esp. p. 308, n. 1.

of a person are self-consciousness with its inherent capacity to will an action consciously. These are the necessary attributes of a subject responsible for his actions, a subject who is morally responsible. In other words, law recognizes and addresses itself only to real persons. Here we have a thorough break with Roman jurisprudence, which made this true only in the case of individuals and admitted a class of fictitious persons which were creations of the state and yet subjects of rights and duties. Gierke replies that persons are never real because the law recognizes them as such. The law does not create personality, for it cannot create the essential attribute of personality, *will*. Law recognizes persons as real because they have in fact the attributes of persons, because they have conscious wills. Gierke is thus an adherent of the so-called *Willenstheorie*, which regards legal rights as inherent attributes of the human will. In this respect he is as much a Romanist as a Germanist, for Roman law considered the rights of the individual as inherent in his will. But Gierke goes further and applies the *Willenstheorie* also where the rights of corporate persons are concerned. He holds that if we are to escape the evils of the Fiction Theory and the Concession Theory, then we must admit the reality of corporate personality. If, that is, law is to recognize that corporate bodies have rights and duties distinct from the private rights and duties of their several constituent members, then it must admit that these corporate bodies are persons as real as individual persons and have a collective will and consciousness as real as those of the individual human being. For Gierke, juristic personality exists only where there is real personality. Hence his theory of the *reale gesammt Person*.

Now, though we may not accept his account of the nature of corporate personality either as a juridical or as a social phenomenon, we should be careful to appreciate the great service he has done in breaking with the superficial dogmas of Romanistic jurisprudence and opening the way to a more vital understanding of the juristic character of corporate life. He has shown us how the Fiction and Concession Theories are the outcome of a false individualism at the very foundation of Roman jurisprudence. The purpose of law is the organization of society in respect of the external actions of its members. It is perhaps true that this organization is in the last resort negative, that is, one of mere non-interference of one person with another, but it is nevertheless an

organization. An organization implies some unity. Where does such unity come from? The orthodox reply is that it is the creation of the state or sovereign which has power to enforce the commands of law and possesses finality of decision. This, as Gierke has shown, is where the logic of Roman jurisprudence exhausted itself. It had no solution for the problem of the source of that power and authority vested in the state for the purpose of carrying out the law. A later world, inheriting its individualistic conception of society, suggested the idea of a social contract as solving the problem.[1] Gierke has shown how the cause of its failure was due to its trying to bring together isolated individuals without any binding principle inherent in their natures. It was an attempt to construct an internal unity by means of an external principle. The individuals who were to be united were by definition incapable of being united. Gierke saw, as did Aristotle, that if society is to be at all possible, it is essential that the individuals who constitute it should be by nature social. Accordingly, he discarded the Romanistic conception of society because, firstly, it cannot give an adequate explanation of those corporate bodies which do exist in society, and, secondly, it makes society and thus the real source of the sanctions of law impossible. With this negative or critical part of Gierke's work we agree entirely. But in his own theory, by which he displaces the Roman, we can follow him but part of the way.

A warning is here necessary. We have said that most of the jurists whom we shall discuss in the remainder of this work speak of corporate personality as real. Yet their theories about the nature of its reality present far-reaching differences. This common acceptance of certain general notions, while giving them very different meanings in the course of their systematic development, is a phenomenon frequently found among jurists. Jurists who prima facie appear in agreement may on a more searching inquiry prove to be in profound disagreement.

This is much the case in our own relation to Gierke. We accept certain general notions which he was the first to introduce or reintroduce into jurisprudence, but in his development of them we find much to criticize. Thus, we are in full sympathy with Gierke's

[1] The weaknesses of the Social Contract Theory are so familiar, and are dwelt on by almost every writer on political and juristic problems, that we have thought it unnecessary to burden this work with their repetition.

view of law as founded in social fact. We do not, however, agree that he has appreciated their relation to each other. Legal organization is based on *de facto* social organization, but it is not one with it. Again, we admit with Gierke the falsity of the distinction between persons in their own right (*sui juris*) and persons created by the state (*alieni juris*). But we do not admit that, in order to escape the latter in accounting for the legal personality of corporate bodies, we must admit the sociologically untenable conception of a transcendent group-will and consciousness. We agree that the human will is an essential element in juristic personality, that there is no legal subject without a will behind it. We shall later have occasion to criticize Ihering for his neglect of the will in his definition of legal rights.[1] But we do not agree that we must, therefore, accept the *Willenstheorie*, with its necessary conclusion as to the nature of corporate persons.

Gierke was no sociologist. Nor was he a philosopher. He was essentially a practical jurist dissatisfied with the evident failure of the orthodox Roman jurisprudence of his day to deal with juristic problems of paramount importance. His profound historical researches led him to believe that old Germanic law contained the germ of a sounder jurisprudence, and this he then sought to grasp and develop into a theory which would satisfy the requirements of modern society. It was in order to support and justify this old German jurisprudence that he entered the domains of sociology and philosophy. He sought to establish its foundation in social fact and to prove its philosophic truth. The point which interests us here is not merely that Gierke acknowledges the importance of studying the sociological basis of law—with this we agree entirely—but that he does not distinguish between the sociological and juristic accounts of social phenomena. His aim to construct a theory 'philosophically true, scientifically sound, morally righteous, legally implicit in codes and decisions, practically convenient, historically destined', is not merely ambitious, it is the result of a confusion of issues. He does not appreciate, or at least he certainly does not respect, the difference between law and morality, jurisprudence and social philosophy. Consequently he defeats his own ends.

The peculiar interplay of juristic and sociological conceptions, which his confusion of juristic and sociological issues brings

[1] *Vide infra*, part iii, ch. ii.

about, makes it very difficult to seize upon the fundamental error in Gierke's thought. It can be done only if we watch its progress very carefully and so observe how it gradually and surreptitiously introduces new categories without allowing for the change.

At first, Gierke's point of view is psychological, and as such sound.[1] In insisting on the psychological reality of the group will he does not mean that the group is a biological organism with a single centre of consciousness.[2] The *Genossenschaftsprinzip* emphasizes the fact that the group is constituted by a plurality of individuals each with a distinct centre of consciousness. Moreover, Gierke insists that the collective will requires an *organ*, i.e. a human will, for its expression. Thus he recognizes the distributive character of the group consciousness and will as a psychological instrument. This *psychological* account of the group stands the test of reference to fact. It is in the social or juridical edifice which he builds up on it as a basis that his thought veers round and fails to take into account the true significance of his original psychological analysis.

It is clearly as a result of the impossibility of applying the *Willenstheorie* to corporate bodies without treating them as biological organisms that Gierke's thought and language cease to be psychological and become philosophical. Unfortunately, his social logic does not fulfil the promise of his social psychology. It reacts from the latter and submits the juridical organization of society rather to the guidance of a rationalistic logic. Hence Gierke's theory of a collective will which absorbs and transcends its constituent individual wills. Now, what Gierke here has in mind is not the instrumental will of psychology, which requires a single centre of consciousness. He is thinking in terms of *value*, of what ought to be realized by means of the psychological will, and in the treatment of this world of value he separates it and considers it quite

[1] Cf. *Das Wesen der menschlichen Verbände*, pp. 21–2. In this passage his point of view is clearly psychological. His language is too moderate to express the full implications of his organic theory.

[2] Many expressions used by Gierke, it is true, justify such a suspicion. But, as we are trying to show, in these he speaks not as a psychologist but as a philosopher dealing with values.

Saleilles also denies that Gierke held a 'biological' theory of society. Vide *La Personnalité Morale*, pp. 528–9; cf. also Jellinek, *Allgemeine Staatslehre*, p. 132.

apart from the facts of the psychological process through which it comes to be realized in the lives of men.

Thus, having granted the reality of corporate personality, Gierke proceeds to sketch society as a graduated series of subjects of rights and duties, extending from the irreducible individual subject of right to the highest and most comprehensive corporate body, the state. The state is itself a corporate person which *includes in itself* as its constituent parts all other corporate persons as well as all individuals. It is the organic unity of society, and *as such* it possesses the right of sovereignty (*Körperschaftshoheit*).

One cannot help noticing the remarkable resemblance of this theory to the so-called 'Philosophical Theory of the State', propounded by Hegelian idealists. Both give us the state as a perfectly articulated, organic unity. Both treat this unity as immanent in society. And both consequently confuse society and the state. We have observed that the Hegelian theory is quite unjustified in its assumptions and at bottom sacrifices facts to the logical perfection of its system. Gierke, influenced by somewhat different considerations, is guilty of the same errors.

If Gierke's theory of the social sanctions of law lays emphasis on the individual, his theory of the state certainly emphasizes society. It treats the individual and all other corporate bodies as moments in the complete life of an organic social whole, the state. They are in no sense outside of, but absorbed in the state. They are subordinate to the will of the state, because this will transcends as well as includes theirs. This transcendent character of the collective will is, of course, essentially an ethical conception. It means that the collective will somehow has a higher moral value, and, therefore, imposes a higher obligation than the wills, single or collective, which are its constituent elements. In other words, Gierke's thought is here essentially rationalistic. It identifies the most comprehensive conception with the most concrete reality. It thus proceeds upon the principle that the more comprehensive includes the less comprehensive, just as the larger circle includes the smaller circle.

It is impossible to see how this point of view can lead to a theory of the state which will limit its function to that of superintendence (*Aufsicht*) over other corporate bodies and over individuals. It ultimately supports the absolute right of the state to determine the lives of its parts. The right of self-administration (*Selbstverwal-*

tungsrecht), which Gierke sets out to establish as a fundamental personal right of all corporate bodies within the state,[1] can at best be explained as a concession. It certainly cannot be considered as a right over and against the corporate sovereignty of the state, and as such limiting it. The organic theory of society cannot admit the real antithesis of socialization and individualization. It treats the latter as an offshoot of the former. In short, Gierke begins by destroying the foundations of the Concession Theory and ends by resuscitating it on ethical or philosophical grounds. This change in Gierke's thought from a psychological realism to a philosophical rationalism is the clue to the understanding of his work. It is also highly instructive in itself, for it enables us to confront the sound intentions with which Gierke sets out by an abstract rationalism utterly unequal to the task of realizing them. He sets out to realize the juristic ideal of a *Rechtsstaat* and, above all, to destroy the theory of the absolute state. But his organic theory, the result of an abstract dialectic, really supports state-absolutism. It makes the social whole, as distinct from the individuals which it comprehends, the real substratum of social or juridical life, and it considers this social whole as an independent, self-developing, self-conscious reality. True, Gierke tries to avoid the conclusion of state-absolutism by denying that law is a creation of the state, and by maintaining it to be the expression of *de facto* social relations. But how can the state be merely the declarer of these social relations so long as it considers itself to be a moral organism absorbing and transcending all other organisms, individual and corporate? Gierke has not explained, and cannot by his organic theory explain, those 'limitations of state-activity' which are found in any actual state, and which he emphasizes so passionately when considering the relations of the state to other corporate bodies. To explain these limitations, we shall have to cease viewing the state as a moral organism absorbing and transcending all other corporate bodies, and to recognize that though it does somehow enter into their lives in the interests of juridical organization, it is, nevertheless, also socially and morally outside of them. But this paradox requires careful elucidation, and this can come only after we have examined other issues.

The reason for this movement of Gierke's thought from one polar extreme to the other, from a psychological realism to a philo-

[1] *Die Genossenschaftstheorie*, pp. 652 and 672.

sophical rationalism, is, we have said, his unquestioning acceptance of the *Willenstheorie*. According to this theory, rights are inherent attributes of the will. Gierke evidently realizes that the *Willenstheorie* can admit the rights of corporate bodies only if they can be said to have real wills. But he does not wish to maintain that they are biological organisms with a single centre of consciousness. Psychology, he finds, is too hard pressed to meet the demands of the *Willenstheorie* in regard to the legal subjectivity of corporate bodies. Consequently the categories of his thought change. He ceases to think in terms of psychological facts and thinks in terms of ethical value. The psychological will drops out of his consideration, and in its place he puts a philosophical 'will' in all essentials like that of Hegel. Will comes to mean value, and its rational interpretation is carried out without reference to the psychological will, which is merely the instrument of its realization.

Gierke here joins hands with the rationalists. The essential feature of rationalism is its dualistic separation of psychology and logic, or, as the rationalist is wont to put it, process and content. It treats their relation on the analogy of the instrument and the purpose to be realized by means of it. Accordingly, the mind viewed psychologically is an instrument by which we realize certain 'values'. It does not create these values any more than the violin creates the musical composition. Just as the latter is evolved in the inspired mind of the composer, so the values of life are evolved in, and through, a logical dialectic, in which the mind abstracts from the facts of the psychological process through which they are realized. Hence the polished Hegelian system. It begins with the absolute, simplified by abstraction from the historical process in which it expresses itself, and proceeds by means of a logical dialectic to differentiate it into the manifold world of human experience. What it discloses is not the character of a living reality but its skeleton.

This same dualistic treatment of instrument and purpose or value, of the psychological and the ethical points of view, is the fundamental error of Gierke's sociology and jurisprudence. In his psychological account of corporate life he admits and emphasizes the plurality of distinct consciousnesses that go to make society. But in his sociological and juristic account of the state he disregards the distributive character of society. He apparently regards it as a *mere peculiarity of the instrument* through which social values are

realized and from which we must abstract in studying those values. The result is that he produces a theory which supports the main tenets of rationalistic jurisprudence. The logical fallacy underlying his social theory of organic incorporation is that of all rationalists: the belief that the more comprehensive our thought becomes the nearer we get to reality; that the wider thought includes the narrower, just as the larger circle includes the smaller. This metaphor is the most misleading one that ever influenced social and, indeed, any philosophic thought. We have already criticized it logically.[1] Its sociological falseness is more apparent. It is, indeed, rather the reverse of the metaphor that applies to the relations of human association. The wider the social institution the less does it generally absorb the individual. Moreover, no such institution ever quite absorbs the individual; nor can any number of them do so. There is always a greater or lesser residuum of his individuality which remains emphatically private, and in practical life constitutes the very hall-mark of his moral personality. At all events, if it is possible to speak of an institution or association as *including* an individual, it is also possible to speak—perhaps with profounder truth—of the individual as containing the institution or association, for only in and through the individual does it exist. But, again, this paradox requires careful examination before its true meaning can be appreciated.

It is sufficient here to have pointed out the falsity of the perspective which Gierke's rationalistic logic gives him. It is essentially analytic and so cannot appreciate the *synthetic* movement of social life. It is formal and static; it cannot, therefore, appreciate the *dynamic* character of social phenomena. No sound understanding of social life can be achieved by a method which is not dynamic and evolutionary. Any sociology which treats society in terms of structure to the exclusion of the living process in which that structure is realized is bound to distort the facts of social life and achieve but a false and empty dogmatism. Sociology cannot disregard the instrument in discussing its purpose. It cannot, that is, consider the teleological significance of social facts apart from their psychological character. Sociology is concerned with *facts as values*, not with values independent of facts. It is Gierke's failure to bear this in mind that has led him into his organic theory of society and the state.

[1] *Vide supra*, part i, ch. iii.

Throughout Gierke's theoretical writings we find the conflict between the psychological realism with which he begins and the abstract rationalism into which he gradually and unwittingly lapses. Many of his later juristic observations are thus entirely out of keeping with his psychological analysis of social groups. Prompted by the latter, he finds the clue to the understanding of corporate life in the principle of the *gesammte Hand* which, he takes care to show, comes from the realm of individual rights (*Individualrecht*). He also maintains, however, that this principle has made possible his organic theory of society. Now this is untrue. Taken in itself, the *Prinzip zur gesammte Hand* does not imply a transcendent will such as Gierke's theory of the social organism implies. It is merely an expression for the joint effort of a plurality of individuals in the realization of a common interest. It expresses in a striking manner the interrelation of these individuals in their associate life. If it implied a transcendent corporate will and consciousness, then surely it could not have its origin in the realm of rights claimed by individuals, but in an entirely different realm of rights claimed by a special genus of corporate persons. Gierke is wrong in holding that the *Prinzip zur gesammte Hand* makes possible his organic theory of society. This theory is the outcome of a rationalistic logic which distorts the real significance of the *Prinzip*. What the *Prinzip* emphasizes is that the corporate body is nothing but the individual members in their relationship. Gierke's organic theory makes it something more, over and above its individual members. The *Prinzip* defines the corporate body in terms of the co-operative efforts of its individual members. Gierke's organic theory defines it in terms of a transcendent reality which is self-conscious and self-developing. Far from being a true interpretation of the *Prinzip*, Gierke's organic theory of society is in contradiction with its essential meaning.

If Gierke's jurisprudence errs in that it is based on a false sociology it errs further in that it confuses sociology and jurisprudence, social philosophy and legal philosophy. This confusion is at the bottom of his contention that the legal personality of a corporate body is one with its *de facto* personality. What is juristically true must be sociologically true. It follows that the problem of the jurist is identical with that of the sociologist. The reason why Gierke is driven to this conclusion in dealing with the problem of corporate personality is, as we have said, his dogmatic acceptance

of the *Willenstheorie*, which makes rights the inherent attributes of the power to will, and thus considers this power to will as the essential feature of legal personality. It will, therefore, be necessary to show that the *Willenstheorie* is false, if we are to avoid Gierke's error. This we propose to do in the following chapter. Let us here note rather the confusion of juristic and sociological issues into which it has led Gierke.

Gierke is right in holding against the adherents of the Fiction Theory that law can protect the rights of real persons only, that the object of its protection is always ultimately a social reality. This is a necessary postulate of any sound legal system; and it is the business of jurisprudence to show how the idea of law involves its recognition. Thus, in the legal treatment of a corporate body it is necessary that the lawyer should recognize it as a single corporate person possessed of corporate rights and duties. But we must not overlook the precise nature of this assumption in regard to corporate personality. It is a perfectly valid assumption from the point of view of the lawyer. But the lawyer's interest in society is after all abstract. As Gierke is well aware, law is interested in the lives of corporate, as well as individual, persons only with a view to watching that they do not interfere with each other where their legal rights and duties are concerned. The jurisdiction of the law over persons individual and corporate is coextensive with the adjustment of their external relations. In this sense, then, the science of law is abstract, as is the science of economics. Like any other abstract science, it requires certain assumptions as to the nature of the world with which it is dealing, and these assumptions are true so long as they do not pretend to be more than assumptions: that is, to explain problems other than those of the science which assumes them.

Now, Gierke is right in insisting on the reality of the corporate persons which law recognizes. But he makes the mistake of overlooking that if this is a necessary assumption for the purposes of juridical organization, it does not necessarily prove their real existence as *social* facts. What Gierke has done is to carry a familiar juristic conception over into the field of sociological inquiry and apply it dogmatically. He has made a μετάβασις εἰς ἄλλο γένος without allowing for the different world of reference into which it takes his thought. He has assumed that what has a substantial reality *in the eyes of the law* is also real from the point of view of

philosophy; that is, from the point of view of what is concrete, living reality. He has substituted an abstraction for a concrete reality.

To consider this error from a different angle. Science deals with types, not individuals. It gives us ideal individuals which do not exist. The actual unique individuals which we meet in experience are always mere approximations to these ideal types. Science can never fully define the unique individual. This is simply an inherent incapacity of all discursive thought, which can work only through the medium of abstraction. Jurisprudence gives us an ideal type of corporate person. Even the *Genossenschaftsprinzip*, in spite of its great flexibility, cannot, as Gierke himself admits, do perfect justice to the uniqueness of any and all individual corporate bodies. Yet Gierke proceeds to commit the error of identifying the ideal type with the real individual. In his theory of the state he holds that the organic unity which he attributes to it as a juridical organization is one with a real organic unity in the actual life of society.

We do not wish to suggest that the scientific type, whether it be a juristic conception or a zoological species, has no reality at all. But we wish to claim for it reality as an abstraction and nothing more. It is got from real individuals by an intellectual process of abstraction. It therefore has its basis and origin in reality, but we must not confuse reality with products got from it by intellectual analysis. Just as geometry, aware of the abstraction it makes, does not offer its explanation of the spatial universe as an explanation of the concrete material world, or its hypothesis as to the nature of space as finally true of reality, so jurisprudence cannot offer its systematic organization of society as a full explanation of social life, or its assumption as to the personality of social groups as finally true of the real, living, social groups. Gierke has not appreciated the ideal character of juristic concepts. He has not paid sufficient attention to the methodology of juristic thought. Had he done so, he would have realized that juristic concepts are *ideal* expressions of social facts, and that their ideality is possible only by means of the abstraction which the jurist deliberately makes in his account of society.[1] Consequently the juristic theory of the state can never be the full truth about the concrete life of society. Society as a real living group has not that systematic unity

[1] Cf. Korkunov, *General Theory of Law* (Engl. trans.), pp. 494 ff.

which juristic theory construes for it. It is full of very real opposition and strife, and even if we view it merely from the point of view of legal order, we can hardly say that the juristic ideal of unity is actually realized. Jurisprudence is a normative science. It sketches for us an ideal, legally ordered society which does not actually exist, which exists only in degree. This ideal is the abstract *type* of scientific thought, which we have considered above.[1] Gierke has given us a type or ideal which does not fulfil the requirements of jurisprudence. He has erred further in holding that this ideal is actually realized. If it were, of course, jurisprudence would be not a normative but a descriptive science.

There is, of course, much in Gierke's work that does not fit in with the general theory which we have attributed to him. This is inevitable in any extensive work, and still more so where the writer is himself tossed between two conflicting points of view. We have, however, no hesitation in saying that he confuses the juristic interpretation of social facts with their intrinsic social character. He does not appreciate the peculiar construction which juristic thought puts upon social facts. This comes out with striking clearness on occasions when his own statements are seemingly pregnant with its recognition. Thus, he emphasizes that, in dealing with a corporation, the state must demand not merely the fact of its birth but its legitimate birth. Reading this, one anticipates the recognition of the ideal construction which juristic thought puts upon social facts. But Gierke almost immediately lapses into the identification of juristic concepts and social facts.[2] The legal personality of a corporation, we are told, is one with a *de facto* personality which it possesses as a living social reality.

Now this is sociologically false. If we are to understand the social nature of group life, we cannot go on using the concept of personality. The corporate life of a group exhibits such very different phenomena from that of the individual that the use of the idea of personality as a key to its interpretation can only result in confusion and false analogies. This we hope to have made clear in the last chapter. Law, however, is quite justified in doing so because it requires a definite and universal conception of the legal subject of rights and duties. This is simply a result of the difference between the legal and the social or moral problem. No better

[1] Cf. also *supra*, Introduction, pp. xxxii ff.

[2] *Die Genossenschaftstheorie*, p. 115.

term has as yet been suggested for the legal subject than 'the person', and, if only by virtue of its usage since time immemorial, there seems to be every reason for retaining it in jurisprudence and redefining it to meet the demands of new experience and scientific progress.

It is possible that in the unfinished account of our own theory, which we have so far evolved in this criticism of Gierke, the reader may have been inclined to suggest that we are destroying the extra-legal sanctions of the state and other juridical organizations. If this is the case, it is a misunderstanding. We do not deny that the state exists by virtue of society believing and willing that it shall exist and enjoy authority and power in its legal jurisdiction, but we cannot accept the view that the actual concrete life of society has the same unity as the state proclaims for it in its juristic view of how it should be organized. The state rules but the external life of individuals. Real social solidarity has its foundation in the inner or spiritual harmony of social life as it goes on in the mind and heart of man. Over these the state has no direct control; nor is it the state's business to look after them. It considers only the actions of men, not their motives or ideals. And it is a tragically certain fact that these ideals are neither perfect nor universal, and that there is not complete spiritual harmony in the concrete life of society.

II

THE THEORY OF SUBJECTIVE RIGHTS AS LEGALLY PROTECTED INTERESTS: RUDOLF VON IHERING AND N. M. KORKUNOV

Organic conception of society — *Willenstheorie* — individualism — Ihering — his sociological point of view — his criticism of the *Willenstheorie* — his theory of subjective rights — its place in his entire jurisprudence — his theory of corporate personality — his failure to appreciate the real meaning in ascription of personality to corporate bodies at law — generality of law — evolutionary character of law — Ihering's theory of subjective rights cannot lead to their understanding as dynamic and evolutionary — Ihering's theory of the state — his theory of law as *Politik der Gewalt* — his theory of auto-limitation of state — need of a natural law with a variable content — Ihering's error in excluding element of will from the definition of rights — its consequences — corporate personality real *as a legal phenomenon* — Korkunov — his definition of the function of the state as the delimitation of interests — his advance on Ihering — his rationalism — his error same as Ihering's — teleological and mechanical aspects of social phenomena — both essential to understanding of law.

GIERKE'S jurisprudence is an admirable illustration of Kant's teaching that a one-sided point of view brings about its own nemesis. His attempt to accommodate the *Willenstheorie* to the facts of juridical organization drove him from a psychological realism to the opposite extreme of a formal rationalism, from which evolved a system in all essentials like that of Hegel. In his theory of the collective will and social organism of the state lies deep-rooted that peculiar mystic nationalism which characterized the political thought of early nineteenth-century Germany. This nationalism, which has been intimately bound up with the rise of the Prussian state, was no accident. It was a by-product of the predominant scientific conception of the time, the biological conception of the organism. As biologists spoke of the human body, so political philosophers were wont to speak of the state and society as an organism. The entire philosophy of the Hegelian school was permeated throughout by the analogy, and its politics made no secret of it. To-day, even those who trace their philosophic thought to Hegel find it necessary to moderate the organic theory of society. But if it is no longer the truth for jurists and political philosophers, it is still the passionate creed of the many reactionaries who fondly style themselves 'nationalists'. It is, indeed, the predominant political creed of countries like Italy, where for so-called *raisons*

d'état we witness the aggrandizement of the state in the professed interests of the nation as opposed to those of the individual. It is not, however, our concern to discuss the politics of Signor Mussolini or of those who share his views on government. It is only the general philosophic background of their nationalism that interests us here; and this is clearly the organic conception of society. Its most dangerous, as also its most obvious, result is the false view of social evolution which it involves. It treats this evolution as something which happens in and for itself—*an und für sich*—and in which the individual is a mere spectator. It thus revolts our moral sense by its annihilation of the individual, his dignity and responsibility as a positive factor in the life of society. It requires no acute observer to detect the deterministic view of the individual to which it leads. And this determinism is the nemesis which a logical development of the *Willenstheorie* brings upon it.

The *Willenstheorie*, which defines rights as inherent attributes of the power to will, has had a long and stubborn career. Like the dragon in the Chinese story, if it has received its death-blow more than once, it still dies hard. Its origin is Roman, for it was in the individualistic Roman jurisprudence that it took deep root and received an uncritical welcome from jurists whose bent was not philosophical. So essential a part of Roman legal thought is it, that it is to be found wherever Roman law has exerted influence. Its golden age, however, came with the French Revolution, when its emphasis on the individual as a subject endowed with inherent natural rights was taken up as an idea of ethical as well as legal value, and sanctified with religious fervour in the famous Declaration of Rights.

The individualism of 1789 is no longer the living creed that it once was. There is a permanent barrier of advanced philosophic and scientific thought, as well as an accumulated social experience which cuts us off from the romanticism of its revolutionary ethic, the simple dogmas of its jurisprudence, and the lurid fallacies of its political programmes. But this is unfortunately truer of our philosophical, political, and juristic thought than of our actual institutions. It is easier to discard *in abstracto* a false juristic conception than it is to weed out its ill effects from an actual legal system, where the demand for historical continuity and the romance of tradition make change difficult. What the jurist has long ousted from his thought will often live on in the technical compositions

of positive law. This is much the position of the *Willenstheorie*. While jurists spurn it, lawyers perforce still practise it. But the challenge of its critics is so profound that legal practice is everywhere reacting and cannot but react to its influence. Almost every jurist in modern times has heaped devastating criticisms upon the *Willenstheorie*. Its arch-opponent to-day is Duguit, who unfortunately makes the mistake of identifying it with any and every theory of *droit subjectif*. This exaggerated and sweeping view of it is significant. It points to the violence of the modern revolt against individualism. The reason for it is writ large in almost every modern work on jurisprudence. It is that an atomic theory of society inevitably leads to a theory of state-absolutism which the modern mind has come to regard with a fearful hate. The centralization of authority, the derivative character of the rights enjoyed by corporate bodies other than the state, which individualistic thinkers from Hobbes right up to the apostles of the Revolution have advocated, are ideas which few thinkers care to support. The predominant tendencies are rather to decentralize society, to distribute political authority, and to recognize the inherent rights of corporate bodies besides the state to conduct their own lives. But that the dogmas of individualism somehow still present a strong front is clearly evident from the very violence of the current attacks on them. Indeed, these attacks are generally so passionate that few of those who make them escape an opposite extreme one-sidedness. Thus we have seen how Duguit criticizes the doctrine of natural rights, and himself ends by supporting an individualistic theory of society in which the unit is not the individual but the professional group.

Now these failures to avoid the fundamental errors of individualism are the result of too sweeping a criticism of the *Willenstheorie*. In dwelling on its errors, critics such as Duguit have failed to preserve the element of truth which it contains, and which its long and at times splendid history should prima facie lead us to suspect. It is, therefore, still important to follow out the path by which the *Willenstheorie* came into disrepute. Its first and foremost critic in modern times was Rudolf von Ihering. But if he saw its one-sidedness and pointed out the important truth which it neglected, he unfortunately misled juristic thought by failing to preserve the important truth which it contained.

Ihering's work stands as one of the most brilliant contributions

to critical and historical jurisprudence. If our present aim were to consider all the problems of a general jurisprudence, we should not forgo a thorough examination of all the main ideas of his system. As it is we must restrict our discussion of his work to that part of it which directly affects the problem of corporate personality. The question which concerns us is how far Ihering's theory of rights overcomes the difficulties of the *Willenstheorie* and leads to a sound juristic understanding of corporate life.

To appreciate the real force of Ihering's work we must bear in mind his historical position. He came as a protestant against the orthodox rationalism of his day, which treated law as the product of a pure logical dialectic. His chief aim was to show that law is not a system of immutable rules but a world of shifting relations, relative to the empirical conditions of social life.[1] Not by a 'legal mathematics' but only by means of an evolutionary and dynamic point of view can we hope to understand the true nature and purport of law. Discarding the formal point of view of rationalistic jurisprudence, Ihering sought to found a sociological science of law which would study the process of legal formation as a 'struggle for right' (*Kampf ums Recht*) between the conflicting claims of the individual and society.[2] Laws, he protested, are not deduced *a priori* from abstract formal conceptions, but are the result of an historical process of social evolution. Their origin lies in the social needs of man, and these are rooted in the empirical and contingent world of social intercourse. Ihering was essentially a utilitarian. He treated every legal rule as corresponding to some practical motive, and this motive was the realization of some human interest.

It was here that he found the basis for his attack on the *Willenstheorie*. Rights, he protested, are not inherent attributes of the human will. The individual is not a subject of rights because he possesses a will. Law is not thus at the service of the will. On the contrary, the will is, juridically speaking, at the service of the law. It is not the will but the interests of man that the law protects. 'Rights are legally protected interests.'[3] This is the famous defini-

[1] 'Juristic principles . . . are not merely logical categories but forms for the concentration of material rules, and rules change with conditions.' *Geist des römischen Rechts*, vol. iii, p. 296, also p. 304. Cf. *Scherz und Ernst in der Jurisprudenz* and *Kampf ums Recht*.

[2] *Kampf ums Recht*, cf. Vinogradoff, *Historical Jurisprudence*, vol. i, p. 142 ff.

[3] *Geist des römischen Rechts*, vol. iii, pp. 332 and 339: 'Rechte sind rechtlich geschutzte Interessen.'

tion of rights which Ihering put in the place of the rationalistic definition of them as inherent attributes of the will. It dropped completely the element of the will, and defined the content of the law merely in terms of the interest which the will pursues. Ihering thus gave a place of exclusive importance to human purposes in his study of the law, and accordingly called his great work on the principles of legal organization *Der Zweck im Recht* (The Purpose in Law). In it he sought to construct a science of purposes—*Zweckwissenschaft*—which, by an analysis of the actual purposes of man, might provide us with the final principles of sound legislation. By ridding himself of the element of the will, he hoped to escape the endless chain of causality which it involves.[1] He was sufficiently a philosopher to appreciate the importance of logic, and he saw that the category of causality was quite unsuitable for the task of juristic construction. It could never attain that finality of judgement which the jurist is out to find. Furthermore, Ihering realized and emphasized that law is not the expression of a world of mechanical relations, but discloses the moral nature of man, and that this, the category of causality cannot appreciate. In its place he therefore put the notion of 'end', the category of teleology which, he held, could alone give finality to juristic judgement and make it a judgement of value.[2] Ihering's own attempt to carry out this programme was hardly more than a brilliant failure. In it he was carried away by that very same exercise of a pure logical dialectic which he so strongly professed to scorn; and we shall have occasion to observe that this relapse was the inevitable result of his failure to appreciate the will as a necessary element in the content of law. But with this part of his work we are not directly concerned. What interests us here is the definition of rights which he used as his guiding principle in it. His jurisprudence concerns us in so far as it enables us to see what happens in the juristic treatment of corporate bodies if, in our definition of rights, we neglect the element of will and take into account only the interest which the human will pursues.

The definition of rights which Ihering gave is, however, not the ultimate foundation of his jurisprudence. It is rather the final

[1] *Der Zweck im Recht*, Vorrede. Cf. also Gény, *Science et Méthode en droit privé positif*, part ii, p. 39.

[2] Ihering thought of the category of teleology as including the category of causality. *Vide ibid.*, Vorrede, p. viii: 'Der Zweck vermag das Kausalitätsgesetz aus sich zu entlassen, nicht aber das Kausalitätsgesetz den Zweck.'

word of one half of it, for he divided the study of jurisprudence into two distinct parts: the one dealing with law in its objective, the other in its subjective, sense. It is to the former that his definition of rights belongs, for it is the aim of a study of law in its objective sense to show what rights there are. Here, the element of will does not enter into the discussion. It is only in order to explain law in its subjective sense, in order to determine who enjoy those rights, that we need take the will into account.[1] Ihering does not deny that rights must belong to someone. A right which does not find its destination in being of some use to someone is a chimera to which his utilitarianism is utterly opposed.[2] He therefore opposes any attempt to maintain rights without subjects—*subjektlose Rechte*. But he avoids any possible contact with the *Willenstheorie* by separating the question of what a right is, from the question of whom it belongs to. He holds that in order to define a right, we do not have to consider its subjective aspect as belonging to someone. We do not need, that is, to refer to the will as a determining factor in it. The right is determined solely by the objective law, which is immanent in the complex of interests which actual society is in the process of realizing. It is, as Ihering put it, a reflex of the objective law, and this law must be studied as a system of relations which co-ordinates interests, not wills.[3]

Now Ihering approaches the problem of corporate personality in a manner strangely unphilosophical compared with that of his approach to other juristic problems.[4] One is surprised at the ease with which he makes his peace with the verdict of orthodox jurisprudence. Not only does he say little about the problem, but what he does say is in the vein of a practical lawyer's language rather than a critical jurist's. Its Roman flavour is unmistakable.

In order to apply his theory of rights to corporate bodies, Ihering appears to have found all that he thought necessary in Roman jurisprudence. He did not see any additional philosophical problem confronting him, but only a technical one. The 'juristic

[1] *Geist des römischen Rechts*, vol. iii, p. 327.

[2] *Ibid.*, vol. iii, p. 356.

[3] For Ihering's theory of the reflex action of law, *vide ibid.*, vol. iii, p. ii, Abt. 2. Duguit professes to draw his inspiration largely from this part of Ihering's work. Cf. *Traité de Droit Constitutionnel*, vol. i, pp. 139 ff.

[4] Ihering does not speak of corporate, but of juristic personality, but he is, of course, referring to the same problem as we are. We shall therefore use the expressions as synonymous.

person' was for him merely an artificial extension of the natural conception of a person, and he did not hesitate to refer to it as a fiction. But this did not lead him to join the ranks of those jurists who would therefore discard it as an empty and useless conception corresponding to no social reality. Ihering was too well aware of the important part played by intellectual construction in juridical organization to accept the criticisms of positivists such as Comte and Duguit. If he was a fictionist, he nevertheless insisted on the practical value and indeed on the necessity of the fiction for the purpose of juridical organization. But unfortunately he did not work out the implications of his view. He appears to have thought that the question was a technical one in which all that was required was the exercise of a kind of legal mechanics. He certainly failed to see any additional philosophical problem. In short, his approach to it was what we can well imagine to have been that of the early Roman jurists when first they found it necessary to refer to the *universitas* as a *persona*.

For Ihering, as for the Roman jurist, there was only one real subject of rights—the individual human being. Rights he defined as legally protected interests; and since interests could be only the interests of human beings, it followed that only they could be subjects of rights. Thus, Ihering denied that an association could be the subject of the rights which nominally the law attributes to it, and maintained that the real subjects of these rights were the individual associates taken separately. Similarly, in the case of a foundation, it is not the foundation-personified which is a subject of rights, but the individual beneficiaries of the foundation-trust. Thus Ihering crystallized his view by identifying it with the old Roman view, which led to the description of corporate bodies by distributive names for their individual members, as for example, *gentiles*, *cives*, *municipes*.[1]

But in spite of his emphasis on the individual as the only real subject of rights, Ihering saw the impossibility of avoiding the fiction of corporate personality in actual practice. If, in the case of a corporate body, each individual member is to be treated separately as a subject of rights and duties which arise in connexion with the corporate activity, the task of legal organization would be practically impossible. If a church were sued, every member would have to be served with a separate writ of summons. If a

[1] *Ibid.*, vol. iii, p. 358.

claim for damages were brought against a railway company, separate proceedings would have to be taken against each shareholder.[1] It was in order to simplify the complex of legal relations which arise wherever there is a corporate pursuit of interests, that Ihering thought the conception of corporate personality indispensable. He considered it to be an economic device by which we simplify the task of co-ordinating legal relations, similar to the device of the parenthesis in algebra. But just as the parenthesis does not introduce any new factor into the equation, so the conception of corporate personality does not introduce any new subject of rights. Legal subjectivity is the attribute of the individual human being only. Corporate personality is only a 'form' or technical device by means of which we simplify, under a unitary expression, the relations of several real persons to each other and to other real persons.

Ihering was thus essentially a fictionist in so far as he denied any real subjectivity to the corporate person, and this is certainly the logical conclusion to be derived from the premisses of his jurisprudence. But the philosophic impulse evident in all his writings drove him to utterances which, if inconsistent with his principal views, are pregnant with a deeper appreciation of the conception of corporate personality than he ever explicitly expressed. He never hesitated to affirm that the conception is indispensable, and he even went so far as to emphasize, in connexion with this point, that what is indispensable to juristic thought, is an essential part of juridical reality. But he never followed out the implications of these utterances, and so he failed to revise his essentially fictionist theory. If, however, we bring out their full import, we are not only compelled to abandon his theory of corporate personality, but also to criticize his definition of rights. It is not strange that the chief errors of his jurisprudence should come out forcibly in that part of it in which he experienced least difficulties, and simplified to an inordinate degree a problem which raises the fundamental issues of juristic thought.

Ihering's reply to the question why the 'form' of juristic personality is necessary to the legal treatment of corporate bodies, was simply that it is an indispensable technical device by which we simplify the multiplicity of legal relations that any corporate

[1] A still more striking illustration of the need of treating the group as a distinct entity is the case of the national debt.

activity involves. This explanation is inadequate both from the point of view of actual legal practice and also in so far as the actual social behaviour of corporate bodies is concerned. In actual legal practice—whether the ruling influence be Roman or German—the form which the conception of corporate or 'juristic' personality ascribes to an association does give it a distinctive character as a juridical phenomenon. It does introduce a new factor into its juridical life, and cannot therefore be likened to the parenthesis in an algebraical equation. The analogy is fundamentally false; for in the equation we are dealing with repetitional units, whereas the 'juristic' person expresses a unity of differences. In the equation, the unit retains its character throughout the various combinations into which it enters. As member of a 'juristic' person, however, the individual undergoes a modification of his own position as a legal subject. His character as a unit of a legally ordered society changes. He abandons some rights and gains others. He takes on new responsibilities and is perhaps relieved of others. In short, the individual does change his legal position when he becomes a member of a corporate body to which the law ascribes juristic personality. Thus, for example, as a private individual, Jones is one legal subject. As a shareholder in Messrs. Jones Ltd., he is another. And this is, moreover, not only the case when and where the guiding hand of the law is felt. It is the very logic of social conduct. The law is not required to make the average member of a church obey its rules. It is not on its proctors that a university ultimately relies for the maintenance of its best traditions in the corporate life of its members. Nor will any sane statesman regard the legislature or the law-courts as the creators of that sense of citizenship on which he relies when appealing to the nation. Man does in fact claim new rights and voluntarily accepts new duties when he associates himself with others in the corporate pursuit of a common interest. This is the social fact to which the conception of corporate personality gives juristic expression. But apparently Ihering did not appreciate the importance of this. If he had done so, he would not have dealt so simply with the problem of corporate personality.

But in the ascription of personality to a corporate body there is a still deeper significance which Ihering failed to appreciate. It raises the fundamental question of the relation of law and society, of legal norms and the social life to which they give a certain form.

If we appreciate its full import we can no longer isolate the problem of corporate personality as Ihering did, but must, as this work seeks to do, consider it in connexion with the fundamental juristic problem of the nature of legal rights. And this will lead us to criticize Ihering's definition of rights as 'legally protected interests'.

The analogy of the algebraical parenthesis will not apply to the legal phenomenon of juristic personality, because in algebra we are dealing with a static world, one in which the units remain permanently the same and in which the relations between them can be exactly foretold and defined. This is not the case where we are concerned with the shifting panorama of social life. We cannot forecast the social life of man. We cannot have an exact science of society. Moreover, the judgements of algebra are also hypothetical: they are true only on the condition of a certain presupposition or abstraction. This conditional premiss or abstraction we can deliberately make. But we cannot do the same in the study of social life. If we do, we achieve but an empty formal rationalism; we construct a social science by distorting the reality which it pretends to explain. This difference between the problem of algebra and the problem of sociology is what we signify when we speak of the former as an exact or static science and of the latter as an evolutionary or dynamic science. No social science has any value which does not appreciate the difference. And jurisprudence, being a social science, must also avoid the pattern and method of the exact and static sciences and use categories which can appreciate the evolutionary character of the world of values which it studies. As Ihering himself insisted, laws do not express *permanent* relations which apply exactly to the particular facts of social intercourse. They are always undergoing changes in their particular applications, and this is possible because their form is always *general*. This generality of the law is, as Duguit has rightly said, the safeguard of our liberties. It prevents the moulding of social life to the pattern of a rigid legal system. It admits expansion of the law, its accommodation to the ever-changing conditions of social life. It makes possible the exercise of a vital justice and guards us against the terrible consequences of rigid antiquated law. It allows for the play of equity within the interstices of positive law.

But this 'generality' of law is merely a negative characteristic and touches only the formal character of law. If we inquire why it is the formal character of law, we find that it necessarily follows

from the inherent character of the social fact which constitutes the content of law. Social life is essentially an evolution, a growth, and the laws which regulate it must therefore be capable of growing so as to meet its ever-changing requirements. But so long as the juristic concepts which we use in legal construction are essentially static or, as Kant would have said, 'analytic', so long shall we fail to achieve a vital system of law which is truly in keeping with the legal consciousness of the times. It is a common platitude on which the layman loves to dwell, that the law is conservative and always 'behind the times'. Here, as usual, the layman is partly wrong, and his error arises from his ignorance of what the law is and of its real problems. He will concentrate on one particular law at a time and fail to consider it as part of a complex system of laws. His point of view is too fragmentary to produce a fair estimate. Yet it must be admitted that it is he who feels when the shoe pinches. If he has little understanding of the philosophy of law and of its great technical problems, he can nevertheless feel the smart of its verdict as much as any learned judge. It is, therefore, the duty of those who frame the law to pay the greatest heed to his complaints. And these are plentiful to-day. We need but contrast the antiquated language of learned judges in the divorce court with that of the press to see how contrary are the views of modern society to a group of laws under which they live. This conflict of actual law and general opinion might be traced throughout the whole structure of our, or any, legal system. But this it is not our purpose to do. What is of immediate interest to us here is the undeniable fact that the law is so often 'behind the times'. The reason for this is the false point of view of those who declare it. It is not evolutionary. It does not appreciate the social problem of law, which is to regulate a growing and not a static world. This point of view has a long history which goes right back to the first longing of man for an eternal, immutable and indubitably true code. And time has provided it with a philosophy which would satisfy its most ambitious aims. But rationalism has had its day. The idea of evolution, coming from biological science and reinforced by the historical sciences, has shattered its bombastic claims and disturbed the dogmatic slumber of its adherents. It has led thinkers to study social life as an evolutionary process and to seek categories which can appreciate its dynamic character. It has introduced the idea of *progress* as an essential element in social theory.

Now it is just the great task of modern jurisprudence to supply the means whereby we may understand the process of legal formation as evolutionary, as the progressive realization of the idea of law in a growing social world. Unless our juristic conceptions satisfy this demand, they are bound to lead to a legal system which fails to fit the society it is meant to regulate. Unless they can appreciate the vital character of social life, its aspect of process as well as its aspect of content, then the laws which they prompt must inevitably be 'behind the times' and in conflict with living public opinion. In other words, juristic theory must allow for the inevitable change in the legal consciousness of mankind which accompanies its ever-changing social experience. Its theory of the nature of legal rights must be essentially evolutionary. This requirement Ihering's definition of legal rights as 'legally protected interests' does not satisfy, and this accounts for the failure of his *Zweck im Recht* to avoid a formal rationalism.

The 'interests' which, according to Ihering, the law protects, are not rigid and permanent. They change with the evolution of mankind. New interests appear, old ones pass away, and even those interests which are nominally the same throughout a long period of time are really being constantly redefined in the minds of those who pursue them. Even those most universal and recurrent interests of man for which he has never ceased to sacrifice his all—the interests of liberty, justice, equality, &c.—are never precisely the same in one age as in another. What was liberty for one generation seems bondage for another. The justice of our forefathers frequently impresses us as primordial cruelty. And so it should and must be, if human life is to have the ethical flavour of progress. It is, at all events, a fact of primary importance to all social thinkers that human interests are evolutionary; and it is therefore the business of the jurist, who would give his jurisprudence a foundation in social fact, to insist on the need of evolutionary legal conceptions by means of which we may accommodate the law to the ever-changing content of social experience.

Now Ihering's definition of rights does not supply us with an evolutionary legal conception. It excludes the element of the living agent or will through whose creative experience the protected interest is evolved. Apart from the will which pursues it, the interest is distorted, dehumanized, emptied of all its real significance as a vital element of human life. As such, it is no longer a

living power but a mere idea. This is just why Ihering dropped into the analytic rationalism which he meant to avoid. His definition of rights gave them the connotation of mere ideas—abstract values such as the 'purposes' of Stammler—and hence he could achieve his Science of Purposes (*Zweckwissenschaft*) only by the exercise of a dogmatic and analytic, logical dialectic. His definition could not lead him to appreciate the process of legal formation as a 'struggle for right', for it dropped out the essential element of that struggle, the element of the human will. The antithesis of the claims of individual and society, which he rightly saw to be the real scene of legal formation, loses its vital significance if we neglect the element of the human will behind these claims. They cease to be dynamic social forces and become static ideas, and the treatment of law which they thus lead to is essentially static and analytic.

Now, in so far as our point of view in legal construction is static, we are bound to fashion laws which do not fit our evolutionary social life. In so far as it is purely analytic, we cannot avoid that dogmatic construction of rationalistic jurisprudence according to which all legal rights are vested in some supreme power which *concedes* them. This is what Ihering's definition of legal rights leads us to accept. It gives the state the role of protector of rights. Ihering, of course, meant these rights to be determined by means of a sociological study of social life, a course which he rendered impossible by his neglect of the essential element of will in his definition of legal rights. But there is a further objection to his theory on the ground of its failure to limit the power of the state. It makes for a system in which there is no limit to the intervention of the state. We have here nothing other than the Austinian sovereign, absolute in its power, unlimited in the sphere of its activities. If the word 'protector' has a more moderate tone than the word 'imperator', it is not because Ihering has lessened the power of his protector-state compared with that of the imperial-state. He admits frankly that the state creates the law, and he holds to this view in spite of the difficulties it involves and the extravagant theories which it forces him to invent. The most extravagant of these is his theory of the auto-limitation by the state of its activities. The amazing point is that Ihering propounds it side by side with his realistic account of the state as a force of irresistible constraint.[1]

[1] *Zweck im Recht*, vol. i, pp. 239–49. The political orientation of Ihering's theory is to be found in Treitschke, *Die Politik*: 'Der Staat ist Macht.'

He saw that if the state is an absolute power the whole of public law must fall to the ground, for the state is then by definition subject to no restraining law.[1] But this Ihering did not seek. He therefore invented the theory that the state imposes limitations upon itself. The difficulty which confronts this theory is obvious. Why should the state voluntarily submit itself to the rule of law? Ihering's answer is curious. Because, he says, the law is the true politics of force—*die Politik der Gewalt*. If the state obeys the laws it makes, then it will itself be better obeyed by its subjects. Obedience to its own laws is, so to speak, the best policy for it to adopt, and that is why it does limit its own activities in accordance with a public law. Ihering's theory of the auto-limitation of the state is thus not a juristic theory. It is hardly more than an *argumentum ad hominem* addressed to the practical politician, and, like all such arguments, is easily and best refuted by an appeal to fact. History does not manifest any strong inclination on the part of *Macht-Staaten* to accept constitutional government. On the contrary, despotic states usually espouse the cause of despotic government, and this is surely what we should expect. The subtlety of Ihering's paradox is hardly more likely to appeal to those who hold the reins in a despotic state than is the maxim 'honesty is the best policy' to the bully who knows the measure of his fist and relies on it for his tyrannous rule.

Ihering's theory of auto-limitation, taken as a whole, failed to find adherents, but its general notion was taken up later by Jellinek, who sought to give it a juristic interpretation. Ihering's failure to account for the fact that there is a public or constitutional law limiting the power of the state was the inevitable result of the formal rationalism into which he was led by his neglect of the element of the human will in his definition of rights. By neglecting this element he lost sight of one of the two factors in that 'struggle for right' through which the law is born. He lost sight of the individual, of the living willing consciousness in and through which the social consciousness, the real creator of law, is born and operates. All that was left was an abstract conception of the state

[1] Cf. Krabbe, *The Modern Idea of the State*: 'Since, therefore, ultimate authority is not found in the law, but on the contrary the law derives its validity from the state, one cannot properly speak of a science of the *LAW* of the state (constitutional law) but only of a science of the *POWER* of the state (politics)' (p. 136).

as a 'thing-in-itself', and since it could therefore be defined only in terms of itself it could have no limit to its power. Thus, in all its ramifications, Ihering's jurisprudence succumbs to the empty rationalism born of an incomplete appreciation of the nature of legal rights, of the content of law. If we follow the course of sociological study which his definition of rights prescribes we shall merely attain a rationalistic science of purposes of the same pattern as Stammler's. If we pursue the course of juristic construction which it prompts we reach but the highly formal and rationalistic conclusions of Austinian jurisprudence.

We can now see how Ihering came so easily to make his peace with the orthodox Roman conception of corporate personality. His theory of the state implies that same concessionary view of the rights of corporate bodies within the state which we found in the Austinian theory. His science of purposes produces that same view of them as derived from the analytic expansion of a single highest purpose, which we have witnessed in the jurisprudence of Stammler. Both the juristic and the sociological sides of his work lead to the Concession Theory, according to which the rights of corporate bodies are conceded to them by the state. Even his theory of the state as binding itself can be expressed in terms of auto-concession. Truly a *reductio ad absurdum* of the entire conception of legal rights as conceded! Ihering's greatest contribution to jurisprudence was his virile notion of the 'struggle for right' as the basis of legal formation. But his inadequate definition of right made it impossible for him to appreciate its vital meaning. The struggle is no mere academic debate carried on by arm-chair philosophers and solved by formal logical disquisitions. It is emphatically a conflict of wills which is carried on throughout the length and breadth of social life. And the important point to bear in mind is that this conflict is endless. It is not one of opposing claims which can for ever be overcome, just as the chemical conflict of two elements is permanently overcome after a certain period of their mixing. The conflict is of the very essence of human life. It is the scene of man's moral life, the make-up of his ethical being. Those who chase the false hope of its final cessation can do so only if they recognize the possibility, as also the virtue, of contented ignorance. But contented ignorance is a fruit that will not grow on the tree of life. To live is to have ever new experiences, to gain a fuller knowledge of the universe, and thus ever to pursue new

interests. Life is an evolution which ends only with the grave. But laws govern the living, not the dead. Their function is thus to regulate a social world in which there is an endless conflict of purposes, in which there is a continual evolution of ideals that takes place through a struggle between human wills, each of which claims to be right, and thus demands legal protection for its efforts. Whatever our social and juristic ideals may be, this remains a fact: the struggle for right is real, and any theory which tries to explain it away as 'apparent' or 'merely phenomenal' is doomed to failure. It will fail to have any meaning for the practice of life which is the ultimate value of all theory.

The rationalist will here enter a characteristic objection that, if what we have said is true, then human life is irrational and can never be submitted to the rationalizing influence of law. If social life is, as we have said, an endless evolution, then how can we ever have a theory about it which has the permanence of truth? This conception is born of that false conception of truth which has led rationalists of all ages to invent eternal and immutable laws which one by one have passed into the limbo of forgotten illusions. Truth, if it is the truth of life, is not something static. Like that life, it too is evolutionary. The rationalist confuses truth with formal logic. The categories of his thought are the static categories of formal logic, and that is why they cannot appreciate the dynamic nature of human life in any of its aspects. If society is an evolutionary growth, then we cannot understand its nature by means of static and formal conceptions. Sociology will never achieve its aim so long as it submits social life to the deadening interpretation of a formal logical catechism. Its great task for the future lies in the discovery of a new kind of causation which will at the same time explain the teleological and mechanical aspects of social phenomena, a new point of view which will comprehend social life both as a process and as a content. When the sociologist has discovered this new principle of causation then the jurist will no doubt have to reconstruct his philosophy of law. But so long as this knowledge is wanting, the best that he can and must do is to work with the two aspects side by side, sacrificing neither the one nor the other. He can at least invent concepts which will help him in practice to allow for the evolutionary nature of social life, as well as to meet the demand for that stabilization of its relations which it is the aim of law to achieve. It is such concep-

tions alone that can supply a 'natural law with a variable content' which jurists are one and all seeking. But unless the 'natural law' includes as an essential element in it the idea of evolution, or as we may here more fittingly say, the idea of variability, it can never be a law which has a variable content. It is the false dualistic opposition of the form of social phenomena, as a permanent natural law, to their content, as a variable world of transitory realities, that constitutes the basic error of rationalism. It is indeed prima facie absurd to think that the laws of life should be static while life itself is dynamic. If we think clearly, the idea is as absurd when couched in the dignified terminology of the rationalist and treated on the plane of metaphysics as it is in the more mundane sphere of political and juristic theory. The natural law with a variable content must be an evolutionary law, a law which expresses the variable character of its content. In short, juristic theory must appreciate the evolutionary character of social life.

It is because Ihering failed to realize this sufficiently, and therefore excluded the element of the will from his definition of legal rights, that he failed to appreciate the profound meaning underlying the ascription of personality to corporate bodies at law. Just as the individual is always in a process of evolution, acquiring new interests and therefore claiming new rights, so corporate bodies are evolutionary. They too grow. Their purposes change with time, and so they come to claim new rights. We speak of a church as growing. We understand clearly what is meant when it is said that trade-unions have grown into something different from what they were fifty years ago, and therefore require a wider recognition and more liberal treatment than they then had. We speak of the 'life of an institution', and indeed attribute to it almost all the attributes of human personality. Our language is, of course, metaphorical when we speak thus, and it cannot be employed in scientific thought. But the fact remains that we do speak about corporate life as we do about individual life, and the fact is significant. It means that a corporate body of men does operate as a distinct social world, as a systematic unity, and that this unity is capable of growth through which its internal and external relations both change. Social groups are somehow subject to the law of evolution, as are the individuals who are their constituent members. This is as frequently neglected as it is obviously true. Since a group is nothing apart from its members it cannot

remain the same when its members change. Yet how often do we see the pathetic attempts of antiquated institutions to retain the goodwill and support of their members.

The Holy Roman Empire did not grow to meet the demands of a new nationalism, and so it passed away. Such also would have been the fate of the British Empire had British statesmen not learnt a salutary lesson from the American experiment. The development of dominion home rule was the only and necessary means by which the Empire could continue to incorporate its constituent dominions with their inevitable nationalist aspirations. The Empire has so far grown with its constituent members. But if the law of evolution has been respected for the most part in British Imperial questions, it still fights a losing battle with a hide-bound conservatism elsewhere. The movement for increased local government has not made as much headway against the traditional centralized government of Westminster as is desirable. The tension between parliament and the syndicalistic forces of trade-unionism has received dangerously little attention. In fact since 1906 parliament has on the whole turned a deaf ear and a blind eye to the entire question of the position of trade-unions in the constitutional organization of the country.[1] They are essentially 'outside the law', and it is inevitable that with their growth they will become, if they have not yet become, a menace to the constitutional government of the nation for which the parliamentary system stands. The position of the Church of England is no less interesting in this connexion. Bound by the static laws of its Establishment it cannot grow to meet the demands of its modern members. Its leaders are well aware of the dangers it thus runs, and the cry for disestablishment is becoming more general. The warning against attempting to maintain institutions in antiquated forms which do not appeal to their modern members might be addressed to universities and many other institutions. But it is not our concern to do so here. What we are concerned to oppose is a system of law which makes it almost impossible, and certainly extremely difficult, for corporate bodies which come under its jurisdiction to alter

[1] This was written before the passing of the *Trade Disputes and Trade Unions Act*, 1927, 17 and 18 Geo. 5. This Act marks the beginning of a new attempt in this country to bring trade-unions within the framework of its constitutional law. The next decade will no doubt produce much legislation varying the relations of the state and trade-unions, and much political and economic history will be made before a relatively permanent settlement of their respective claims is achieved.

their *modus vivendi* so as to meet the demands of new social conditions. The Free Church of Scotland could do so only by means of an Act of Parliament. Trade-unions have had to seek freedom outside of the bounds of legal jurisdiction.[1]

The trouble arises not only from the Concession Theory, according to which the law creates the rights of corporate bodies within the state; it arises essentially from the inadequate legal conception of the nature of corporate bodies with which those who concede their rights work. It is a static conception which treats the life of a corporate body as rigidly co-extensive with the literal meaning of the clauses of an original trust-deed. It does not take into account the social reality behind the legal form in which the corporate body appears at law. This social reality is a group of human beings who are ever changing in their corporate life, evolving new corporate interests, and so changing both the internal and external relations of the corporate body. Therefore, if law is to fulfil its social function, it must recognize the evolutionary character of corporate bodies, their capacity to grow and legally to change their *modus vivendi* in accordance with altered social conditions.

Now the Fiction and Concession Theories are incompatible with such a law. Those who support these theories are ignorant of the real meaning and value of it. Their description of corporate bodies as 'persons' is merely a technical procedure of the vital import of which they are unconscious. This was the case with Ihering. He never realized that the real significance in the ascription of personality to corporate bodies is its assertion that they are living realities which grow and must change with the growth of their several members and altered conditions of life. Had he seen this he would have ceased to speak of the fictitious personality of corporate bodies at law and admitted that they have a real legal personality. We say *real legal* personality, for we are not suggesting that there is a real social group-person such as we have criticized elsewhere. We merely say that the personality is real *for law*: as real for law, that is, as the personality of the individual human being. This qualification of the theory that corporate personality is real as a legal phenomenon we shall proceed to discuss in the following chapter. Here we wish only to insist on Ihering's failure to appreciate the real meaning of the conception of corporate person-

[1] The vital significance of the *Trades Disputes Act* (1906) lies in its recognition of the reality of corporateness in bodies that are not legally corporate.

ality for law. The conception is indispensable if we are to have an evolutionary conception of the juristic character of corporate life; and, as we have seen, we cannot hope to solve the social problem of law unless we have such a conception at our service. The idea of personality signifies life, life signifies evolution, and we therefore require the conception of corporate personality in dealing with the juristic nature of corporate life, in order to allow for its inherent evolutionary character. In this way only can we understand truly the relations between corporate bodies as the relations between social forces engaged in a 'struggle for right'. The conception of corporate personality includes the element of will behind the interests at stake in the struggle, and so gives a complete and vital expression to the social reality engaged in the conflict through which the law is born and the conditions of which the law should regulate. It enables us to grasp the facts of social life in their naked reality, and prevents our sacrificing one element to another in our juristic interpretation of the struggle for right. We shall not, at all events, fall into Ihering's error of making the state the creator of law and legal rights, and we shall not require his theory of auto-limitation in order to save public law in the face of an unlimited sovereign power.

The danger of Ihering's definition of legal rights, in so far as it does not imply any limitation of the sovereign power of the state, has been admitted by sympathetic disciples who have sought to remedy the defect. An interesting attempt to do so is that of the late Prof. Korkunov, who is for the most part a follower of Ihering's teaching.[1] Korkunov, though certainly not an individualistic thinker but rather inclined to consider juristic problems from the point of view of society, had a keen sympathy with the English liberal doctrines of the nineteenth century, especially with those of John Stuart Mill. He knew only too well the crushing tyranny of the absolute and unconstitutional sovereignty of the Romanoffs, and championed with amazing boldness those rights of the individual which we in England are still wont to call his 'liberties'. Much as he admired Ihering, therefore, Korkunov saw that his theory of rights led to an excessive intervention of the state in the life of the community.[2] If the state is to protect interests, it ought to see that the best means are adopted for their realization and

[1] Korkunov, *Theory of Law* (Engl. transl. from the Russian by W. G. Hastings).

[2] *Ibid.*, p. 115.

this must lead to an interference of the state in the life of the individual which will stifle all personal initiative—the *élan vital* of social life. The state will possess a monopoly of social welfare. It was in order to limit the power of the state, to prevent its encroachment on those preserves of social life where it has no mission, that Korkunov defined rights as legally *delimited* interests, and not, with Ihering, as legally *protected* interests. It followed that the function of the state was the *delimitation* of interests, not their protection.[1] 'It (the state) stands thus between two extremes, between the indifference to individual action which the formal conception of law requires and the suppression of individual independence which would seem to be the logical consequence of the utilitarian theory of law.'[2]

Korkunov's advance on Ihering lies in the clearer account he has given of the juristic problem which a theory of legal rights has to solve. He has attempted to preserve both the social and the individual elements in dealing with the 'struggle for right'. He has made a genuine effort to harmonize the restraining influence of legal organization with the inherent spontaneity of individual life. He was above all an evolutionary thinker, and thought only in terms of a law which was progressive and grew with the social life it regulated.[3] He had as little sympathy with the rationalist as with the positivist. He thus opposed the rationalistic idea of the state as an unlimited power. But if he retained a clearer view of the juristic problem than did Ihering, he did not achieve any better solution of it. He remained with Ihering the uncompromising opponent of the *Willenstheorie*, and praised him for being the first jurist to separate completely the definition of law from that of the will.[4] Hence his full agreement with Ihering's theory of corporate personality.[5] This in itself shows how his definition of rights as legally delimited interests brings us very little farther than that of Ihering. By neglecting the element of will behind those interests, he cannot appreciate their real nature and must fail to explain why and how they are to be delimited. His definition of rights is thus open to the same objections as those which we brought against Ihering's definition. It gives an incomplete account of the social reality which is the content of law.

[1] *Ibid.*, p. 52.
[2] *Ibid.*, p. 115.
[3] *Ibid.*, pp. 71, 118, 144 and 326.
[4] *Ibid.*, p. 107.
[5] *Ibid.*, pp. 203–4.

Korkunov, like Ihering, never quite freed himself from the coils of rationalism. In their vehement attack on the *Willenstheorie* they both reacted into an opposite extreme one-sidedness, an abstract point of view which was itself but a rationalism of a different pattern. They rightly criticized the *Willenstheorie* for its neglect of the 'interest', which is an essential element of the content of a legal right. They went astray, however, in making this interest, apart from the human will which pursues it, the sole content of law. The *Willenstheorie* could but lead to a rationalism of the Austinian kind. Korkunov and Ihering have made the way for a rationalistic jurisprudence of the neo-Kantian kind. The reason for this lies deeply rooted in their method of treating juristic problems. They proceed upon the basis of the same distinction between purpose and instrument, end and means, as we draw in the sphere of mechanics. In the latter we can separate the two and construct the instrument or means to suit the purpose or end. This we cannot do where the problem is one of organizing living society. We cannot study the ends of social life apart from the instrument through which they are to be realized. We cannot, that is, separate the teleological problem from the scientific problem. This point cannot be over-emphasized. It was the failure of Ihering and Korkunov to see it that constituted the stumbling-block of their juristic systems. Their definitions of legal rights separated the teleological aspect of social life, in which we are concerned with the 'interests' of human effort, from the scientific aspect of social life, in which we are concerned with the wills behind that effort. Such a dualistic treatment of social and juristic problems could result only in an abstract rationalism.

We have elsewhere spoken of this two-sidedness of juristic problems by saying that they have always both a real or *de facto* aspect and an ideal or normative aspect. If jurisprudence is to give us principles for the juridical organization of society which have a practical value, then it must take both these aspects into account when constructing its theories. Principles derived from an abstract logic, apart from a scientific understanding of the actual empirical life of society, are bound to lead to a legal system which will not suit the society to which it is applied. Such a system is bound to fail through a lack of those political or extra-legal sanctions by virtue of which legal conceptions become legal commands.[1]

[1] *Vide supra*, part i, ch. i.

And this is so because the content of juristic thought is always an historical reality. Unless our juristic conceptions take into account all the elements of this reality they must fail to help us in its legal interpretation. This is why the definitions of legal rights which Ihering and Korkunov have given us will not do. By their neglect of the element of the human will they have failed to take into account an essential element of that social reality which is the content of law.

III

THE STATE AS PRESUPPOSITION OF THE LAW: GEORG JELLINEK

THE LAW AS PRESUPPOSITION OF THE STATE: H. KRABBE

Theories of subjective right — Georg Jellinek — his aim — his opposition to the *Willenstheorie* and to Ihering's theory — *System der subjektiven öffentlichen Rechte* — Jellinek's theory of corporate personality — his criticism of the Fiction Theory — his theory of the state as a juristic person — his view of sovereignty — his theory of auto-limitation — priority of state over law in Jellinek's system — failure of Jellinek's theory of the state due to his not following out faithfully the precepts of his own theory of subjective rights — his rationalism due to over-emphasizing distinction between social and juristic theory — Krabbe — his theory of the sovereignty of law — his antithesis of personal and impersonal — his agreement with Ihering — his objection to juristic personality of the state — his criticism of Jellinek's theory of subjective rights — law as 'the precipitate from an evaluation of competing interests' — Krabbe's democratic law — priority of law over state in Krabbe's theory — appreciation of Krabbe's work — objections to which it is open — Krabbe's false view of psychology — his confusion of juristic with political issue — his rationalism — his theory of the state involves Concession Theory — reason for Krabbe's errors: incomplete appreciation of social fact which forms the content of law — the struggle for right — competing interests and clashing wills — law as a compromise — summary.

THE real subject of modern juristic debate is undoubtedly the idea of sovereignty, especially that of state-sovereignty. We can, however, be more precise in describing the main theme of modern jurisprudence. An analysis of the theories as to the nature of legal rights which modern jurists have propounded enables us to state more exactly the vital points in regard to which they differ and the extent of their differences. We have observed how the discussion as to the nature of legal rights turns upon the question of what place, if any, a definition of them must give to the two elements of social fact—will and interest. Two extreme, opposing answers have been given. The adherents of the *Willenstheorie*, such as Savigny and Windscheid, defined the legal right purely as an inherent attribute of the power to will, and left the element of interest entirely out of account. Ihering reacted against this theory and went to the very opposite extreme. He discarded the element of will as irrelevant, and defined the content of legal rights in terms of interest only. He performed a valuable service by his criticism

of the *Willenstheorie*. But, unfortunately, he failed to appreciate that part of the truth which it did contain. Consequently, his own theory was no less one-sided. A proof of this is the fact that in his own theory of the state he was forced to agree with those whom he sought to oppose. This, as Kant showed, is the ironical fate of any one-sided or abstract thought.

It was inevitable that some *rapprochement* between the two theories should be attempted, and this was what Georg Jellinek sought to do. He was an admiring disciple of Ihering, but he was not blind to the defects of his jurisprudence. He was, of course, at an advantage in having Ihering's work behind him, and could therefore begin where Ihering left off. This is just what he did. His work was essentially a critical commentary on that of Ihering. He accepted what he considered sound in Ihering's jurisprudence and developed his own theories on the ruins of its errors. There was, however, an important difference between the two jurists. Jellinek's point of view was, in the Kantian sense, more 'critical' than that of Ihering. His aim, like that of every true jurist, was to understand the empirical phenomena of juridical organization. But his method of studying them was to ask what is logically necessary to the understanding of them as a unified system. 'Legal science . . . is a normative science, similar to logic, which does not teach us the nature of things, but how we must think of them *in order that we may produce an uncontradictory knowledge of them*.'[1] And we shall see, this and similar statements are pregnant with both the truths and the errors of Jellinek's jurisprudence.

Jellinek's main purpose was to construct a general theory of the state (*Allegemeine Staatslehre*) which would explain the state as a legal organization bound by its own laws. No one was more desirous of achieving the ideal of a *Rechtsstaat* than he, and it was Ihering's failure to submit the state to the rule of law that led him to examine critically the foundations of Ihering's jurisprudence. He criticized Ihering's theory of auto-limitation as not being a juristic theory at all. It was a political argument which simply failed to answer the demands of the juristic problem. Jellinek, who had a keen methodological sense, was ever ready to insist that jurisprudence is a distinct science with its own peculiar problems

[1] *Allgemeine Staatslehre* (3rd ed.), p. 138; cf. also p. 161. Cf. *System der subjektiven öffentlichen Rechte* (2nd ed.), p. 13. (*Note*: The italics in the text are mine.)

and its own peculiar method of treating them. While recognizing the importance of social theory for juristic theory, he emphasized the distinction between them and constantly issued warnings against their confusion.[1] Similarly he distinguished between the problems of philosophy and the problems of jurisprudence. He was thus determined to find a solution to the problem of limiting the state's power without going outside the province of juristic thought proper. As we shall see, he was forced to retain Ihering's formula of 'auto-limitation', for, like Ihering, he found himself confronted by the problem of limiting a power which was by definition absolute. But unlike Ihering, who explained the state's auto-limitation on the ground of political expediency, Jellinek sought to explain it as resulting from the inherent character of the state *as a juridical organization*. For this purpose he thought the conception of corporate personality indispensable. But like any conception which Jellinek used, it had a peculiar meaning for him. To appreciate it, we must first examine his amendment to Ihering's definition of subjective rights.

Jellinek was no partisan of the *Willenstheorie*. He saw that the individualistic system, to which it gives rise, ends in the negation of public law, and it was his chief aim to give public law a sure foundation. Never did he come anywhere near identifying subjective right with the natural faculty of willing. But he did realize that the will is an essential element of the content of law. Rules of law, he maintained, are always concerned with the relations of a subject to something, and we cannot therefore define subjective rights which express these relations jurally, unless we include in our definition of them the subject as well as the something. In other words, he held that 'will', as well as 'interest', was an essential element of a subjective right, which he therefore defined as '*a power of will* belonging to man and directed towards a benefit or interest, in so far as it is recognized and protected by the juridical order'.[2] Jellinek thus regarded rights as living forces and not as inert ideas. His definition is substantially sound, for it includes (1) the element of will, (2) the element of interest which the will

[1] *Allgemeine Staatslehre*, p. 138. Hence his criticisms of Gierke, pp. 159 and 162.

[2] *System der subjektiven öffentlichen Rechte* (2nd ed.), p. 44. Cf. his definition of subjective rights in the first edition of the same work—'the benefit or interest protected by a force of will belonging to man or rather by a power of will belonging to man' (p. 42).

pursues, and (3) the juridical order without which the social fact has no juristic value. Accordingly, Jellinek's theory is not to be confused with that of Gierke. He criticized Gierke for identifying the social and the juristic,[1] and emphasized that, though the former is somehow the basis of the latter, they are not identical. The juristic judgement is a peculiar interpretation of social fact. Hence the account which the jurist has to give of social phenomena will not be the same as that of the sociologist.[2] The full import of this becomes apparent in Jellinek's theory of the reflex action of law, which he took from Ihering. Though he treated the law as a system of subjective rights,[3] it was not a subjectivist system, such as the doctrine of natural rights supports, that he sought to construct. He considered these subjective rights as reflexes of the objective law.[4] In spite of his theory that the state creates this law, Jellinek did hold that subjective rights are not inherent attributes of the natural faculty of will, that they are not merely *de facto* but *de jure* powers. It is not merely the fact of a will pursuing an interest that gives rise to a subjective right, but the interpretation of that fact as part of a system of such facts the relations of which are determined by juristic considerations. These considerations are those which arise from the need of maintaining the unity of the state, and to this end Jellinek employed the critical method of asking what is logically necessary to the idea of that unity.

Though Jellinek also proposed to mitigate the conclusions of the orthodox theory of the absolute state, he was first and foremost interested in upholding public law—or, as he considered it, the *System der subjectiven öffentlichen Rechte*—against the destructive conclusions of the individualistic theory of natural rights. His theory of subjective rights had upset the *Willenstheorie*. It had defined subjective rights not as natural powers but as social functions. Their content was not merely power, but power consciously directed to the realization of some social purpose. Thus Jellinek had broken down the atomism of the *Willenstheorie* and exposed the social character of law. But there remained the difficulty of explaining how the state could be a subject of rights. For this

[1] *Allgemeine Staatslehre*, p. 159.

[2] *Ibid.*, p. 50.

[3] *Ibid.*, pp. 408–9: 'Das subjective öffentliche Recht ist die Grundlage des korporativen Charakters des Staates.' Hence his *System der subjectiven öffentlichen Rechte*.

[4] *System der subjektiven öffentlichen Rechte* (2nd ed.), p. 8.

purpose Jellinek held it necessary to use the conception of juristic or corporate personality.[1]

We must first avoid confusing Jellinek's theory of corporate personality with that of Gierke, which he criticised as giving an account of the *pre-juristic* existence of the state.[2] Jellinek held that corporate personality was a purely juristic conception and not an empirical reality. It gives an account of the state as a legal and not as a social phenomenon. Considered as a social fact, the state appears as an association of resident human beings, which is endowed with original power;[3] considered as a legal phenomenon, it appears as a ruling corporate body endowed with original power: that is, as a subject of rights, and as such it is a corporate person.[4] While the juristic conception of the state must 'join on to' the social conception of it, it is not one with the latter.[5] Its elements are the empirical realities which the sociologist has to analyse, but it is more than a mere record of them. It is essentially an ideal synthesis of them, which is necessary to explain society as a unified legal organization. To understand just what he meant by this account of the corporate personality of the state as a purely juristic conception, we must bear in mind Jellinek's emphasis on the abstract nature of juristic thought. 'It does not teach us the nature of things, but how we must think of them in order that we may give an uncontradictory knowledge of them.'[6] 'We never get real being from juristic conceptions but always standards or norms which are meant to be realized in human action.'[7] Thus the conception of the legal subject, whether it be applied to an individual or to a collectivity, is an ideal norm, and does not signify any literally corresponding social reality. This was, indeed, the real burden of Jellinek's opposition to the *Willenstheorie*. He criticized the identification of the person or legal subject with the human being as a naïve error which arises from ignorance as to the peculiar construction which juristic thought puts upon social realities.[8]

[1] Jellinek, like Ihering, speaks of 'juristic' rather than corporate, personality. He obviously prefers it because it indicates that the conception of the corporate person is a juristic, not a sociological conception.

[2] *Allgemeine Staatslehre*, p. 159.

[3] *Ibid.*, p. 181. '. . . die mit ursprünglicher Herrschermacht ausgerüstete Verbandseinheit sesshafter Menschen.'

[4] *Ibid.*, p. 183. '. . . die mit ursprünglicher Herrschermacht ausgestattete Gebietskörperschaft.'

[5] *Ibid.*, pp. 182–3. [6] *Ibid.*, p. 138. [7] *Ibid.*, p. 162.

[8] *Ibid.*, p. 183: '. . . naiven Identifizierung der Person mit dem Menschen.'

Thus not only the conception of corporate personality but also that of individual personality was, for Jellinek, a purely juristic conception which did not, and had no need to, correspond literally to any social reality. It is significant that he usually spoke of *juristic* personality instead of *corporate* personality.

But nothing was further from Jellinek's mind than to identify juristic conceptions with fictions. The Romanist lawyer, who spoke of the juristic personality of a corporation as a fiction, was a naïve empiricist and identified the real with the observable. Jellinek, on the other hand, had a philosophical appreciation of the nature of knowledge. He had a 'critical' understanding of the conceptual element in our judgements about reality, of the part which intellectual construction plays in them. Moreover, he criticized the Fictionists for identifying what is real for the jurist with what is real for the sociologist. Their error in regarding juristic persons as fictions arose from their failure to appreciate the peculiar construction which the jurist puts upon social facts. The jurist is certainly concerned with the empirical facts of social life, but only in so far as they realize the ideal of legal order. In this sense his point of view is abstract, and the judgements which it produces are also abstract. They are only *forms of synthesis* necessary to the understanding of society as a legal organization. They are purely conceptual; they have no material existence. But Jellinek protested vehemently against the view that they are therefore fictions. 'Only if we distinguish that which is thought from the material world, and call it as such a fiction, can we identify the abstract (i.e. the conceptual) with the fictitious—in which case, however, the whole of science would be but a sum of fictions.'[1] Conceptions which are necessary to the understanding of society as a legal organization are real for the jurist. To call them fictitious and unreal is to deny the very reality and, of course, the possibility of law. They become fictions only when we make them something more or less than they truly are. If we consider them as defining real substances, then they are mere fictions. If, however, we consider them as expressing only relations, jural relations, and not substances, then with their reality stands or falls the reality of law itself. Jellinek therefore championed the reality of corporate personality as a juristic phenomenon. He held that it was no fiction because he found it to be a conception or 'form of synthesis'

[1] *Allgemeine Staatslehre*, p. 163. Cf. *supra*, Introduction, pp. 31 ff.

necessary to the juridical organization of society. Accordingly, its reality is the reality of an ideal, for it expresses an ideal relation of social fact to a system of legal norms. Its content, which comprises the elements of will and interest is always empirical, social reality. But the conception itself is more than the mere assertion of its content as a fact. It is an ideal synthesis of that content, and its reality is commensurate with its realization of the ideal of law in that synthesis.[1] Thus Jellinek laid aside the objections which Duguit raises on the ground that there is no observable fact corresponding to the idea of corporate personality.

Unfortunately, Jellinek did not appreciate the full import of his admirable excursus into the aim and method of juristic thought. Instead of maintaining the steady connexion between the social and the juristic accounts of society, on which he had himself insisted, he gradually abandoned his thought to the exercise of a formal, rationalistic dialectic. He finally separated the juristic theory of the state from the social theory of it to the point of excluding from the former a full consideration of the social elements which are the content of the state as a subject of rights. In order to show how 'subjective public right is the foundation of the corporate character of the state',[2] Jellinek should have shown how the state comprises the three elements which he himself found essential to the existence of subjective right: (1) a power of will, (2) an interest or complex of interests which the will pursues, and (3) a juridical order which gives juristic value to the will pursuing the interest. But this Jellinek did not do thoroughly. In his analysis of the state as a corporate person or subject of right he gave an undue emphasis to the element of power and so drifted into a purely formal account of it. As we shall see, he was ultimately compelled to face the same insoluble problem of limiting a power by definition unlimited, as he originally set out to avoid.

Jellinek wished to avoid the difficulty of the orthodox theory of state-sovereignty in subordinating the state to the rule of law. His first step was to deny that sovereignty is an essential attribute of the state. He was too much an historical jurist and too well acquainted with the facts of federal state-hood to overlook the difficulties which 'sovereign theories' encounter in explaining the fact that there have been and are states which are nevertheless not sovereign. He held that sovereignty is an historical, not an absolute category.[3]

[1] *Ibid.*, p. 138. [2] *Ibid.*, pp. 408–9. [3] *Ibid.*, p. 475.

Its presence or absence does not affect the existence of a state. But it is very doubtful whether Jellinek did more than change the emphasis of the orthodox theory of state-sovereignty. For it was still in terms of will, and will alone, that he defined the essential character of the juristic personality of the state. He made it unessential that the power of the state should be supreme,[1] but he insisted that the state must be capable of exercising a will of its own if it is to possess the attribute of personality. Inherence of power is then the distinguishing feature of the state, and as such, it takes on the form of juristic personality. Thus in his theory of the state Jellinek relapses into a formalism which still considers juristic relations in terms of inherent superiority of will. In making the state alone possessed of inherent powers, Jellinek cannot avoid the false implications of the Concession Theory in dealing with other corporate bodies. Their powers are then essentially derivative. It follows that their juristic personality is a fiction, for Jellinek regards the state as a real juristic person because its powers are inherent in it. Jellinek appears to have been quite aware of these implications of his theory of the state and to have accepted them. 'The state', he wrote, 'is not one association among so many others, but the highest and ruling association of all associations.'[2] It is quite clear from his writings that he was here thinking in terms of the hierarchical subordination of one will to another. He insisted that all law—e.g. private law, company law, trade-union law, &c.—is subordinate to the public law of the state, and even in the case of Church Law, where he appears to have hesitated and thought it necessary to admit its independence (*Selbstständigkeit*), he asserted that 'we must recognize that this independence is only relative.'[3] By 'relative' we must understand 'conceded' or 'derivative' if we are to preserve intact his theory of the state; and then we have the unmeaning paradox of conceded independence. This is just an illustration of the hopeless confusion into which we are led if we consider juristic relations only in terms of superiority of will.

That this was what Jellinek was doing in his theory of the state is clearly shown by the view he accepted of law as created by the state. '... The state is not created by the law but is rather the very

[1] He thus broke away from Ihering's view that irresistible force is essential to a state's existence. Cf. *Geist des römischen Rechts*, vol. iii, pp. 328–9.

[2] *Ibid.*, p. 391. [3] *Ibid.*, p. 393.

basis of the existence of the law.'[1] Jellinek here left out of consideration the content of law and thought of it only formally as resting on an inherent power to command. As we have frequently shown, this point of view can lead only to the definition of law as the command of the sovereign, a definition of law incompatible with the idea of a *Rechtsstaat*. Jellinek certainly realized this and taxed all his ingenuity to overcome the difficulty of limiting a power which is by definition subject to no other power. The result was that he took over Ihering's formula of auto-limitation and sought to give it a juristic foundation.

If the state was a subject of rights because it possessed inherent powers and was thus self-determining, how could it be also a subject of duties? Jellinek evidently thought that by denying that sovereignty was an essential attribute of the state he had got rid of the thorny and insoluble problem of limiting a power by definition absolute. But by another road he arrived at the same problem. If he did not regard the state as necessarily sovereign, he did regard it as the creator of law. Thus, if he did not have to explain how an absolute sovereign can be limited, he nevertheless had to explain how the creator of law can be limited by his own creations. To distinguish between the two problems would be a purely sophistical dichotomy. Indeed, Jellinek's attempt to supply a solution shows how the two problems are really the same. The foundation which he gives to the auto-limitation by the state of its powers, to the subordination of the state to the law which it creates, is a correlative of the formal account he gave of the nature of corporate personality. The state, we are told, retains its inherent power in submitting to the rules of law, for by doing so it limits itself.[1] This argument in itself does not answer the crucial question of *why* the state must obey its law. Indeed it sounds like the casuistical apologia of one who is making a virtue of necessity and yet will not admit the constraint of that necessity. But there is another argument which Jellinek brings forward to explain why the state is bound by the law it makes. This argument stands out as an important landmark in the history of juristic thought, for it opened new avenues of speculation in regard to the nature of juristic personality and the relation between law and state.

The state, said Jellinek, can only choose what law it is to have,

[1] *Ibid.*, p. 274, 'Der Zeugungsakt selbst (of the state) . . . liegt gänzlich ausserhalb des Rechtes.'

[1] *Ibid.*, p. 478.

and not whether it is to have a law at all.[1] This conclusion he drew from the idea of the state as a corporate or juristic person. As such the state is a purely juristic conception. Anarchy is possible only in fact, not in law. Law means order, and where there is no order, there is no law. The state as a juristic conception must therefore disappear with the disappearance of law. Jellinek thus concluded that the subordination of the state to the law which it creates is a necessary implication of the very idea of the state as a juridical organization.

Kelsen and Krabbe have developed this argument to show how state and law are one and the same thing.[2] It makes the autonomy of the state one with the autonomy of the law. But this is contrary to the fundamental ideas of Jellinek's *Allgemeine Staatslehre*, which insists upon the distinction between the state and law and gives priority to the former. The state is, according to Jellinek, a social structure and has as such an existence independent of the law. It is the essential presupposition of the law, for it alone supplies the power necessary to guarantee the binding force (*Verbindlichkeit*) of the law. This independence (*Selbstständigkeit*) of the state comes out strikingly in Jellinek's account of its position in regard to international law. Though Jellinek held that international law is real law, he did not hesitate to affirm that if the existence of a state is challenged by the rules of that law, it is the latter that must go by the board.[3] For, 'international law exists for the states and not the states for international law'.[4] The same notion pervades Jellinek's account of the foundation of the state (*die Entstehung des Staates*). 'The state is not created by the law but is much rather the very basis of the existence of the law.'[5] Jellinek criticized the attempts of jurists in the Middle Ages to explain the formation of states as a legal process. 'The productive act itself is entirely extrinsic to the law.'[6] It is a pure act of will which is not regulated by any law, international or national. 'The state cannot establish law for its own foundation (*Entstehung*), since it must first

[1] *Ibid.*, pp. 477 and ff.

[2] Kelsen, *Der soziologische und juristische Staatsbegriff*, pp. 115–24. Krabbe, *The Modern Idea of the State* (Engl. Transl.). For references, *vide infra*.

[3] He found it possible to hold that international law is real law, because he defined the rules of law as 'guaranteed norms', not as norms of constraint (*ibid.*, pp. 332–7). Jellinek classified the 'guarantees' of public law as i. social; ii. political; iii. legal. Law, he held, can exist even when the legal guarantees are wanting. Cf. *ibid.*, pp. 788 ff.

[4] *Ibid.*, p. 377.

[5] *Ibid.* pp. 274 and p. 364 ff.

[6] *Ibid.*, p. 274.

exist in order to produce law.'[1] It is abundantly clear from these statements that Jellinek never meant to identify law and state, but regarded the state as prior to the law and as such originally outside of it. His theory that auto-limitation is necessary to the very existence of the state thus involves conclusions incompatible with the fundamental ideas of his general theory of the state. The truth is that Jellinek fell into the position of the orthodox rationalist when he made the state the creator of the law. Accordingly, it is not his theory of the state itself but rather the reasons why he came to accept it that are here of interest to us.

The immediate reason is that he did not remain true to his own theory of subjective right. Had he done so, he would not have separated the idea of the state as a power from the idea of it as a complex of human interests. He would not have neglected to take into account the fact that this power is consciously directed towards the realization of certain interests. He would, that is, have defined the state in terms of its content and not merely in terms of its form. He did, it is true, hold that 'the study of the foundation of the state leads to its necessary completion in the study of the purposes of the state'.[2] But he separated them in carrying out the former. The result was that he arrived at a definition of the state as power, which, like that of the orthodox rationalist, made the state prior to the law and as such impossible of limitation by law. Had he not separated the element of will from the element of interest in his consideration of the subjective rights of the state, he would have avoided this absolute dualism of state and law. He would then have been able to explain how the state cannot exist without law, and how its subordination to a constitutional law is the very logic of its activity. Furthermore, he would have come nearer to a true appreciation of the conception of corporate personality. He defined the essential attribute of corporate personality as inherence of power and so came to the view that the state is alone a real corporate person. So long as we think only in terms of an hierarchical series of powers, it is only the highest of them that can have its power inherent in it. If, however, we consider this power in relation to an interest in whose service it is exercised, then it is possible to reconcile the ideas of inherence of power and limitation of power. It is possible to admit the inherence of the power of the state and yet to limit that power to the pursuit of

[1] *Ibid.*, p. 273. [2] *Ibid.*, p. 229.

certain interests. It follows that the state is not exclusively possessed of inherent powers, but that other corporate bodies too enjoy them within the limits of the pursuits of their respective legitimate interests. Jellinek cut himself off from these conclusions by his definition of corporate personality in terms only of the power to will. It is this view of corporate personality that prompts critics like M. Berthélemy passionately to oppose the entire conception. 'Let us avoid assimilating the state to a person who commands, for we construct by this new fiction a formidable being in no way resembling the beings who surround us, a being whose pretensions we cannot limit and whose omnipotence we cannot moderate.'[1]

Another and perhaps profounder reason why Jellinek relapsed into a rationalistic theory of corporate personality is to be found in the rigorous distinction he drew between social theory and juristic theory. He emphasized this distinction to the point of separating entirely the two kinds of judgement. He rightly showed that juristic conceptions are abstractions, that 'we never get real being from juristic conceptions but always standards or norms which are meant to be realized in human action'.[2] But he was so concerned to emphasize the abstraction involved in juristic thought that he tended to forget that the abstraction is somehow bound up with the reality from which it is got by a selective effort of mind. His continual assertion that juristic judgements are 'purely conceptual' intoxicated him with an intellectualistic prejudice which found its expression later in his theory of the state. For, there he neglected to show how the abstraction is bound up with the reality, how the formal character of the state as a juristic person is bound up with the character of the social fact which is its real content. The formalism of his General Theory of the State compares very unfavourably with the admirable concreteness of his Theory of Subjective Right. Whereas the latter makes the way for an evolutionary appreciation of legal formation as a 'struggle for right', admitting that legal judgements have a normative or ideal as well as an actual or *de facto* element, the former leads but to a static and formal treatment of law as the arbitrary command of a sovereign.

Jellinek's theory of the state has turned many jurists against the theory of subjective right, for it has frequently been thought that

[1] Berthélemy, in *Revue du droit public*, (1904), p. 213.
[2] *Ibid.*, p. 162.

the former is the logical outcome of the latter. We have seen that this is not true, and that Jellinek came to his theory of the state because he did not follow the precepts of his theory of subjective right. Unfortunately, this has not been generally realized by his critics, who have therefore failed to appreciate the real advance he made on Ihering. Thus Jellinek's criticisms have not prevented a renaissance of the theory that subjective rights are 'legally protected interests'. One eminent jurist, in particular, has reacted strongly in its favour and used it in support of the thesis that in the modern state it is the law that possesses the attribute of sovereignty. Prof. Krabbe teaches that the basic principle of jurisprudence is the sovereignty of the law (*Rechtssouveränität*).[1]

Krabbe is essentially an historical thinker desirous of avoiding abstract, *a priori* theories. For him the problems of jurisprudence are mutable, changing with the empirical facts of political life from age to age. Accordingly, he thinks it necessary to distinguish the modern state from that of other ages, to appreciate the novel political facts which it presents, for it is only such a course that can guide us in the construction of vital juristic theories which will fit the facts of political life. Now, Krabbe finds that the modern state does not function in accordance with the theory that the state is a sovereign authority prior to the law.[2] Jurists of the *ancien régime* could use the theory because they were thereby 'seeking a basis for something real, while at present the theory is trying to make a basis for something that has ceased to be real'.[3] In the eighteenth century the sovereignty of the ruler was a fact; to-day it is not, for it is now the accepted view that he derives his rulership from the positive law.[4] It is in this transformation of the idea of the sovereign that Krabbe finds the clue to the modern juristic theory of the state. He calls for a reconsideration of the relation between law and state, because with the disappearance of the fact of a personal sovereign power must disappear the view that the state is prior to and creates the law. 'An impersonal power is taking the place of a personal authority; a spiritual rulership the place of "*sic volo, sic iubeo*".'[5] Krabbe thus thinks that the notion of sovereignty which means rulership based upon superiority of

[1] Krabbe, *Die Lehre der Rechtssouveränität* (1906).

[2] *Ibid.*, pp. 85 ff. Cf. *The Modern Idea of the State* (Engl. transl.), p. 204.

[3] *The Modern Idea of the State*, p. 206. By the term 'real' Krabbe here means 'actual'.

[4] *Ibid.*, p. 204.

[5] *Ibid.*, p. 35.

will should be expunged from political and juristic theory alike, and in its place we should put what he considers the dominant feature of the modern state, namely, the sovereignty of the law.

This antithesis of the personal and the impersonal runs right through Krabbe's work. Though it frequently changes its connotation according to the context of his thought, its meaning for Krabbe is always the difference it stresses between law which is the creation of an arbitrary sovereign will and law which is by nature sovereign, because it has its source in a 'sense of right', which lies at the basis of actual communal life, and so has objective value.[1] In order to give law that objective value which alone can explain its imperative character, Krabbe thinks we must find its source in some power other than that of the will. If the law is to control the human will, it cannot get its binding force from that will.[2] At any rate, it is impossible to see how a will, which can give or withhold from the law its binding force, can itself be bound by that law. Krabbe holds that those theories which make sovereignty an attribute of will can never avoid the untenable conclusion that law is the creation of an arbitrary and unlimited sovereign power. He therefore drops the element of will entirely out of the account which he gives of the nature of law, and allies himself with Ihering in his view as to the nature of subjective right.

Krabbe's appreciation of Ihering is especially illuminating in that it brings out visibly the driving force behind Krabbe's own thought. Speaking of Ihering's 'legally protected interests', he says that 'there gradually developed from this idea the important principle that the law discloses a *judgement of value* concerning *interests*, that in this judgement the moral nature of man is expressed, and that as a consequence law-making is not primarily a juridical but an *ethical* process'.[3] This statement helps us to understand Krabbe's desire to eradicate from the sphere of juristic thought any reference to the personal element in human life, that is the will. The personal means for him the purely subjective and arbitrary, as opposed to the objective and truly valid. Hence he decries any attempt to include the element of will as a determining

[1] *The Modern Idea of State*, pp. 232, 50: 'The objective character of the rule of law is directly implied in the fact that there is a standard in us which operates objectively.' *Ibid.*, p. 85.

[2] *Ibid.*, p. 44.

[3] *Ibid.*, p. 133. The italics are Krabbe's.

factor in the content of legal relations. He presses this objection not only against theories of sovereignty like that of Hobbes or Austin but also against Jellinek's theory of the juristic personality of the state. 'A juristic personality has been brought forward called indifferently the state or the community, which is alleged to be the possessor of all the authority formerly wielded as power. It is further alleged that the actual rulers derive their legal competence from their relation to this personality.'[1] Krabbe considers the whole theory a useless attempt to supply a basis for something which no longer exists. 'Self-justifying sovereigns' are no more. The modern civilized state recognizes no authority, whether of king, minister, or civil servant, which is not derived from positive law. It does not admit a natural power inherent in certain wills, but only a legal power derived from the positive law. The theory of the juristic personality of the state is an advance in so far as it does not seek to find sovereignty in any particular will or organ of the state.[2] But Krabbe sees in it no more than a gesture. It does not overcome the error of making authority personal, for it puts authority into the hands of an hypothetical person. The result is that the law is still subordinate to an authority which, by declaring it, creates it.[3] The theory is thus still bound down to the treatment of law as a fiat of will; it cannot, therefore, explain the state as an organization governed throughout by law, and so cannot account for the rationale of actual legal practice in modern civilized state. Krabbe's criticism is scathing. He complains that 'the German school (i.e. Jellinek) is always preoccupied with an idea of the state which is typical of the *ancien régime*.' Their theory of the state has consequently 'the same characteristics as the fictions of political theory in the *ancien régime*; it is dialectic biased by propaganda.'[4] It is clear from these criticisms that Krabbe has concentrated on that part of Jellinek's teaching in which, as we have seen, he falls a victim to an abstract rationalism. Krabbe does not give the same consideration to Jellinek's theory of subjective right as he gives to his theory of the state. He apparently takes it

[1] *Ibid.*, pp. 205–6.

[2] Cf. *ibid.*, Introduction by the translators, Professors Sabine and Sheppard, pp. xxxi ff. This *Introduction* presents an interesting and lucid exposition of the main ideas of Krabbe's jurisprudence.

[3] *Ibid.*, p. 176. 'For the authority which gives rise to the legal character and binding force of rules lies outside the will and claims to dominate it.'

[4] *Ibid.*, pp. 205–6.

for granted that the former is the logical outcome of the latter. But, by so doing he has missed the vital point in Jellinek's amendment to Ihering's definition of subjective right. He has not realized that Jellinek meant thereby not that law is simply a fiat of will, as the *Willenstheorie* makes it, but that the will is *an element* in the content of law. Further, he has missed the real value of the conception of corporate personality, namely, that it gives expression to the entire content of a juridical organization. Jellinek himself failed to give a true account of it in the later stages of his thought, and it is this account that Krabbe has seized on as the butt for his criticisms of the entire conception of juristic personality.

Convinced, then, that the will has been and always will be the *enfant terrible* of juristic theory, Krabbe, like Ihering, excludes it entirely from the definition of law.[1] In order to define the nature of law adequately and to explain its binding force, Krabbe says that we must satisfy two conditions. Firstly, its validity must depend upon some power outside the human will and so possess objectivity with reference to this will. And secondly, since law has the practical purpose of regulating conduct, it must be in agreement with the spiritual nature of those to whom it is applied. Accordingly, Krabbe says that the theory of legal obligation must take 'the spiritual nature of man as its point of departure.'[2]

The manner in which Krabbe thus formulates the problem of defining the law leads one at first to anticipate a rationalistic treatment of it similar to that of the neo-Kantians. Kelsen has held that there is a close kinship between Krabbe's conclusions and his own. His criticisms of Krabbe are instructive, for they show how Krabbe can be driven into the position of Kelsen. But the fact is that Krabbe's point of view is entirely different from that of Kelsen. It is psychological. Whereas Kelsen finds the binding force of law in its possession of a certain formal structure, Krabbe traces it to its origin in a certain human feeling, the 'feeling of right' (*Rechtsgefühl*) which includes as its more developed form the 'sense of right' (*Rechtsbewusstsein*).[3] This feeling, we are told, is as effective among men as the feelings of love and friendship. But its operation has nothing to do with, and is independent of, the will.

[1] *Vide supra*, part iii, ch. ii, p. 169. [2] *The Modern Idea of State*, p. 45.

[3] *Ibid.*, pp. 46 ff. The term 'feeling of right' (*Rechtsgefühl*) is comprehensive; it includes as its less developed form the 'instinct of right' (*Rechtsinstinkt*) and as its more developed form the 'sense of right' (*Rechtsbewusstsein*).

It is a feeling which produces standards or norms in accordance with which we direct our behaviour. Far from being in any way determined by the will, it operates by way of controlling the will. Thus the will does not enter into the definition of the rules of law. They are the product of a moral faculty, which is independent of, and indeed superior to, the will. The control of the will is, however, only the extrinsic effect of the operation of the sense of right. It does not touch the essence of its operation as a *juristic* phenomenon. As such, its essence is to be sought in its intrinsic nature, which is an evaluation of competing interests. Rules of law are accordingly 'the precipitate from an evaluation of competing interests'.[1]

Now Krabbe differs from the neo-Kantians in that he does not wish to make this evaluation result from the exercise of an abstract dialectic proceeding from *a priori* principles. Such a view would not satisfy the second condition of any adequate definition of law, namely, that it must explain how the law is in agreement with the spiritual nature of those to whom it is applied.[2] For Krabbe, law is founded on empirical fact, and that is why he avoids making it depend for its validity upon an abstract conception. The 'sense of right' which he makes the source of law is the individual human being's 'sense of right',[3] and this, he emphasizes, is no abstract idea but a concrete activity going on in the empirical world of social intercourse. Krabbe, therefore, claims that his theory avoids making the source of law an impotent abstraction, such as Duguit's conception of solidarity. On the contrary, it proceeds 'upon the firm foundation of fact',[4] and Krabbe here means what is fact in the modern civilized state. This is very important; for if, as Krabbe holds, the German theory of the state errs through being preoccupied with the state of the *ancien régime*, Krabbe himself suffers from a similar narrowness of outlook. He is himself so preoccupied with the modern state that he does not distinguish between what is essential to the existence of a state and the particular form in which it appears historically. This accounts for his view that law is real only if it is democratically produced.[5] Krabbe, as we shall see, confuses the juristic with a political issue.

[1] *Ibid.*, p. 263.
[2] *Vide supra*, p. 204.
[3] *Ibid.*, p. 83.
[4] Ibid., p. 49. For Krabbe's criticism of Duguit *vide ibid.*, p. 207.
[5] *Ibid.*, p. 34 and pp. 69–78.

Rules of law, then, are the precipitate from a democratic evaluation of competing interests. This evaluation is not the work of will but of the 'sense of right' which claims to dominate the will. Krabbe thus thinks he has got rid of the 'particularist' or individualistic implications of the doctrine of natural rights, for the 'sense of right' means 'the sense which lies at the basis of the communal life as this life is actually lived'.[1] Yet, as Krabbe must admit, the sense of right of one man does not always agree with that of another. It is to solve this problem that Krabbe espouses the cause of majority rule. The community cannot exist unless it has a single rule, and that is why the sense of right attaches the highest value to it.[2] Thus democratic representation is essential to law, for by this means alone can the law have its source in the operation of man's sense of right, and majority rule is essential to law, for it alone ensures the existence of that single rule without which there can be no community.

Now this law, says Krabbe, is the true sovereign. It is 'by nature sovereign', for it has its basis in 'an ultimate phase of consciousness which manifests itself as the feeling or sense of right.'[3] All rulers, whether kings, ministers, or corporate bodies, derive their rulership from it.[4] The state is not a power outside of the law, but, like any individual, subordinate to it. The concept of the state cannot, therefore, be defined in terms of an original, extra-legal power. Nor can it be defined as having its essence in the care of certain specific interests.[5] It is not a complex of interests but a legal community; that is, its essence is a community of law, and it reveals itself only in the making of law. 'The essence of the state is revealed in the working of a common law which forms for a portion of mankind an independent source of legal value.'[6] Krabbe thus insists that the concept of the state must not be defined by reference to the care of any special interests but solely by reference to the 'unique and original source of law' from which all interests derive their value.[7] Accordingly Krabbe reverses the relation between law and state as Jellinek defined it. Jellinek made the state prior to the law and the creator of it. Krabbe makes the law prior to the state and the source of its power. He is willing to accept Jellinek's definition of the state only on condition that the

[1] *The Modern Idea of State*, p. 50. [2] *Ibid.*, p. 74.
[3] *Ibid.*, pp. 198 and 232. [4] *Ibid.*, p. 208. [5] *Ibid.*, pp. 226 ff.
[6] *Ibid.*, p. 212. [7] *Ibid.*, p. 230.

power to rule be traced to the rulership of law.[1] This view of the relation of law and state, he says, can alone explain the state as an organization lawful through and through, as a community governed throughout by law.

In spite of the criticisms to which it is open, there is much in Krabbe's work that calls forth one's admiration. Few writers have insisted so strongly and lucidly as he that the aim of jurisprudence is to define the ideal of a *Rechtsstaat*. He has shown with stimulating freshness how the existence of an arbitrary power over and above the law is incompatible with a truly lawful organization of society. Moreover, his own theory manifests a genuine attempt to avoid both the abstract formalism of the neo-Kantians and the crude realism of Duguit. It seeks both to maintain the ideal or normative character of rules of law and to give them a foundation in social fact. But it does not achieve this aim. On the one hand, Kelsen claims that it has a close affinity with his own theory, and this claim is not unjustified. On the other hand, it is also possible to bring against Krabbe's theory the very objection which he brings against that of Duguit.

Krabbe says that it is from the realm of psychology that the theory of legal sovereignty adopts the view that the sense of right is ultimate.[2] There is no objection to its doing so provided we do not attribute to it a meaning other than that which the psychologist gives it. All that he means and can mean by it is that the moral consciousness is a fact, and there does in fact operate within our minds a certain faculty of judgement which distinguishes between a right and a wrong, and in accordance with that distinction influences our conduct. This reference to the realm of psychology is certainly relevant, for it is upon the presupposition that the distinction between right and wrong does operate in and influence the mind of man that the jurist proceeds upon his task of discovering the right organization of society. But to establish as a psychological fact the existence of a sense of right is not a solution of the juristic problem. It merely states the fact upon which the jurist works, and, in doing so, the jurist no longer finds himself in the field of pure psychology. Psychology cannot tell us how the

[1] *Ibid.*, p. 212. Jellinek's definition of the state is: 'An association of men, residing in a specific territory, collectively endowed with an underived power to rule.' *Allgemeine Staatslehre*, p. 181.

[2] *Ibid.*, p. 60.

sense of right operates as a faculty of judging values. It cannot give an account of its normative function. It can go no further than to say that it does operate and to show its *causal* effect on the behaviour of our entire psycho-physical organisms. In short, it cannot determine what is right and what is wrong, nor how we are to determine what is right and what is wrong. But this is just the business of the jurist, for he is not merely concerned with the generalization of facts but also with the valuation of tendencies.[1] And, indeed, Krabbe admits this. He denies that a mere reference to the feeling of right enables us to dispense with the search for the ultimate criterion of right.[2] But if this is so, can we deduce the binding force of the law merely from its origin in *a* sense or feeling of right? Clearly not. It is on the basis of some criterion of right, some judgement of value, that we must establish the sovereignty of law.

Now, Krabbe admits this by the very fact that he tries to discover a criterion. He realizes that if the law were not the outcome of a judgement of value according to some criterion of right, the relations between ruler and ruled would be *de facto* and not legal relations. They would not have that normative character without which the law 'completely forfeits its objectivity and stands in conflict with reality'.[3] Krabbe finds the necessary criterion or standard in accordance with which the sense of right must operate in formulating rules of law, in the idea of community.[4] This standard is not extrinsic to the sense of right; it is rather the inherent principle of the sense of right, for Krabbe really identifies the sense of right with a sense of community.[5] In other words, he admits that the problem of law is a social problem, and that its solution must take into account the sociological foundations of law. But, unfortunately, Krabbe does not achieve a sound sociological jurisprudence. He errs in two important respects. Firstly, he confuses the juristic issue with a social issue. Secondly, he falls a victim to the subtle influence of a rationalism which is born of an incomplete appreciation of the social fact which makes up the content of law.

We have already observed that the guarantees which the

[1] *Ibid.*, Introduction, p. xii.
[2] *Ibid.*, p. 44.
[3] *Ibid.*, p. 50. It is 'the sense which lies at the basis of the communal life as this life is actually lived'.
[4] *Ibid.*, p. 60.
[4] *Ibid.*, pp. 30 and 74.

political scientist requires for the proper exercise of authority are not what the jurist is concerned to discover. The former is interested in the relative merits of different modes of political organization. It is, for example, his business to determine whether the interests of society are better served by vesting political power in a single despot or in a democratically elected, representative assembly. For the jurist, however, the question as to which is the better guarantee against the misuse of power does not arise. He is not concerned with the relative merits of different modes of political organization, but only with the bare fact of political organization. He must take into account, in his definition of law, its extra-legal or political sanctions. But it is not within his province to pass judgement on one or another method of expressing those sanctions. It is sufficient for him that the rules of law should have a sanction, be it autocratically or democratically produced. In short, the extra-legal sanctions of law are, from the point of view of the jurist, facts not values. They are the *de facto* element of juristic judgements. Krabbe goes too far. He holds that rules of law have the sanctions necessary to them only if they are given through the channel of democratic legislation. There is, he thinks, only one true law, and that is democratically produced law. This conclusion of Krabbe is very important, for it contains the germ of that rationalism which permeates his whole system. It really does away with the extra-legal sanctions of law. It makes the sanctions of law themselves legal! They are the product of a collective functioning of so many senses of right, and the sense of right is the legal consciousness in man. It follows that the province of legal judgement is exclusive and self-contained, as, we have seen, it is for Dicey and the neo-Kantians.[1] It is not surprising, therefore, that Kelsen welcomes Krabbe's theory of law and finds it necessary only to add that it should not be treated as a psychological postulate but as the result of a pure logical dialectic.[2]

Why does Krabbe thus fall victim to an abstract rationalism, in spite of his historical approach to the problems of jurisprudence? The answer lies in his opposition to the will as a positive factor in the constitution of legal relations. This he has inherited from Ihering, and Jellinek's misapplication of his own theory of subjective right has led him to think that so long as the will is con-

[1] *Vide supra*, part i, ch. i, p. 16, and part i, ch. ii, p. 30.

[2] *Der sozialogische und juristische Staatsbegriff*, pp. 185 and 189.

sidered as an element in the content of rules of law, we can never escape having to admit a power over and above the law. Thus he excludes the will altogether from the definition of rules of law and defines these as 'evaluations of competing interests'. We have already shown at length in discussing Ihering's jurisprudence how this makes for a rationalistic treatment of law. Ihering's definition of subjective rights as 'legally protected interests' finally drove him to a theory of state-absolutism. We may well ask whether Krabbe, who accepts this definition of rights and accordingly defines the social problem of law as the evaluation of competing interests, is not also finally driven into a position in which he cannot consistently avoid the essential implications of those 'sovereign theories' which he criticizes so strongly.

Krabbe's mind works always and foremost in conscious opposition to the idea of law as the creation of an arbitrary power. He apparently considers this opposition to arbitrary sovereignty as the crucial point of modern juristic thought, and, as he is wont to emphasize, of legal practice in the modern state. Now this is certainly a characteristic theme of modern juristic thought; but if it were all that is distinctive of the problem of modern jurisprudence and of modern legal practice, we should have to date them both back to the French Revolution and perhaps even earlier. Krabbe is inclined to overlook an equally predominant feature of the juristic problem as it presents itself to-day. This feature is that which Duguit and the syndicalists stress beyond all others. It is that aspect of the juristic problem with which theories of corporate personality are mainly concerned. It is the question of knowing how far the state has control over all legal value. We have seen how Romanist jurisprudence gave the state absolute control over all legal value, a view in support of which it invented the Concession Theory. It is as much against this view that the state is coextensive with the entire field of legal activity, as against the view that the state is an unlimited sovereign power, that the efforts of modern jurists are directed. Rationalism has been unable to overcome this view of the state. Krabbe also fails to avoid it, and the reason for this is the rationalistic character of his thought.

Krabbe criticizes Duguit for taking the public service as the point of departure for juristic theory.[1] Every public service, and indeed every corporation, derives its power from the law. All

[1] *Ibid.*, p. 229

rulership can be traced back to a single authority, that of the law. Hence Krabbe takes the law as the basic concept for juristic theory, and so he thinks we shall achieve an organization of society that will be lawful throughout. But what of the modern outcry against the theory that the state is alone possessed of all legal power? Krabbe makes the state have control over all legal value; in fact, he identifies the state and the law. 'The reality of the state is rooted in its control over legal value'[1] . . . 'In this control the state lives and manifests its power.'[2] It is one with that judgement about human interests which is the law. Whatever other implications this identification of the state and the law may have, it does mean that all legal power is vested in the state and that other corporate bodies within it can have only a conceded legal power. Krabbe's theory of the state cannot avoid the concessionary view of the rights of corporate bodies within the state. To judge from his writings, he does not really mind this conclusion; for it is, according to his theory, always a concession by law—that is, a concession in accordance with the rules of law—that creates a legal corporation within the state. Why does Krabbe, then, accept so complacently a theory of the relation between the state and other corporate bodies against which there is to-day such strong resentment? In the Free Church case the proceedings were thoroughly legal—that is, according to the established law of Great Britain—and, in the end, the recognized legislative power, Parliament, granted it those demands which it had vainly pursued through the Courts of Law. Yet Free Church men never forgave, and probably will never forgive, what they considered an encroachment of the state on the preserves of their freedom as a religious corporation. This is just an illustration of the general refusal of important corporate bodies other than the state to abide by the implications of the Concession Theory. The idea that their powers are derived from the state is generally disbelieved and denied. What is of still more vital importance, it has been found to be no longer practicable. The state has found it impossible to put it into practice when dealing with Trade Unions. These bodies claim a sphere of jurisdiction over which they deny that the state has any control, and recent facts show that if the state has not admitted the claim in theory it has certainly allowed it in practice. Yet, Krabbe's theory of the state, in spite of its claim to be the 'Modern Idea of the State', cannot consistently

[1] *Ibid.*, p. 214. [2] *Ibid.*, p. 215.

avoid the implication of the Concession Theory, and Krabbe himself does not appear to regret it.

The explanation of this lies in the incomplete account which Krabbe gives of the social facts at the foundation of law. By his neglect of the will, Krabbe has excluded from his definition of law an essential element of its content. He has defined the content of law as 'competing interests'. This is an incomplete account of it, for the reality of these interests is rooted in the fact that they have wills at their service. We cannot, therefore, leave the element of will out of our definition of law without distorting the social reality at its basis. So long as we think of this reality in terms of interest only we are dealing with abstract ideas, and our treatment of them is bound to consist in the exercise of a purely logical dialectic, as did that of Ihering. Legal formation is not a purely logical process. It is a struggle for right, and the reality of this struggle lies not merely in a disagreement of senses of right but also in a conflict between the wills at the service of those senses of right. The struggle is not a mere conflict of ideas, solved by the exercise of a logical dialectic; it is also a conflict between the wills which strive to realize those ideas, and the solution of this conflict cannot lie in a purely ideological treatment of the ideas. We should lose touch with the empirical world of social intercourse, and our conclusions would not help us to achieve the ultimate aim of juristic thought, namely, the legal organization of actual society. To drop out from the content of law the element of will is to overlook that struggle for right through which the law is born and in which it continues to live. To put in the place of that struggle a logical dialectic, exercised by a sense of right which operates according to a purely objective standard, is to distort the elementary facts out of which the problems of jurisprudence arise. This is what Krabbe has done in tracing the law exclusively to the sense of right, which is 'a power standing outside human will and possessing objectivity with reference to this will'.[1]

Although he recognizes the imperfections of the sense of right in any and every human being, and the consequent differences between their opinions as to what is right and what is wrong,[2] Krabbe does not alter his original view that the law has its source and foundation in a purely objective sense of right and not in the will of man. Yet he asserts that 'we must guard against the error

[1] *Ibid.*, p. 45.

[2] *Ibid.*, pp. 60–1.

of the theory of natural law, which neglected the complexity of human nature and reduced man to a purely legal entity.'[1] Krabbe wishes both to eat his cake and to have it. He wants to maintain the objectivity of law while admitting, as he must, its inevitable subjectivity and inadequacy from the standpoint of objective truth. The result, however, is that he sacrifices the latter in order to preserve the notion of the former. That is why he remains content to exclude the will from the content of law. His theory of law contemplates a world in which legal formation is the work of a pure logic proceeding according to objective standards. It is, accordingly, a theory which will not solve the problems of jurisprudence. The law, into the nature of which the jurist inquires, is the law of a world in which there is a plurality of senses of right, none of which is perfect, and among which there is not universal agreement on questions of right and wrong. It is the law of a world in which we witness a continual conflict, and only if the law is fashioned on the basis of a sound knowledge of that conflict can it have any real value for the life of society. To appreciate that conflict we cannot treat it merely as a conflict of ideas which is ultimately resolved by the exercise of a logical dialectic. We must recognize that it is a conflict of claims resulting in a clash of wills. To illustrate our meaning let us suppose two groups of men, A and B, each of which is asserting a claim incompatible with the claim of the other. They may both submit their conflicting claims to arbitration, but that arbitration may move only within certain limits. If the award goes past a certain point in favour of group A, group B will not abide by the arbitration. It will then cease to abide by reasoned judgement and will take its stand on the ground of its own will. The conflict between the two groups will appear as a conflict of wills and not merely as a conflict of claims. This is the essential character of that conflict which is ever going on throughout the length and breadth of social life. If its resolution were possible through the operation of a perfect sense of right present in every individual, then we might well consider it as a purely logical dialectic and the law which settles it as purely objective. But this is not possible, because no man's sense of right is perfect, and because—this is the crucial point—there is consequently a point at which the sense of right ceases to operate objectively and becomes subjective in the sense that it no longer controls the will but puts

[1] *Ibid.*, p. 60.

itself at the command of the will. That is why the law is not deducible from *a priori* conceptions. It is not a purely ideal or normative judgement. It is essentially a compromise between *de facto* power and ideal considerations. On the one hand, it is bound within the actual limits imposed by the incomplete senses of right of those whom it addresses; on the other hand, it is an effort to transcend those limits and to regulate social intercourse in accordance with the ideals of order and justice. And to exclude from its content the element of will is to overlook the *de facto* aspect of it, its dependence upon extra-legal sanctions which are the given limits within which the synthetic efforts of juristic idealism may operate.

It follows from the same fact of the imperfections and disagreements of the senses of right of actual men that we cannot consider the control over legal value as belonging exclusively to one organization, the state. It is not to a political issue that we here refer. It is the vital juristic problem of deciding the precise limits to the freedom and independence of a collectivity. So long as we consider the collectivity in terms of 'interest' only we cannot avoid placing the control of its legal activities in the hands of that body which proposes to pursue the 'highest' interest, namely, the state. If, however, we take into account the complete social reality which constitutes the collectivity we shall consider it not merely in terms of 'interest' but also in terms of 'will'. We shall then realize that the control of legal value belongs there where it is naturally assumed: that is, to those in whose wills was born the initiative to realize the corporate interest. We will not, however, accept Duguit's 'collection of independent collectivities' as an account of the state, because it does not take into account the co-operative character of all human effort and, in this particular reference, the co-operative character of the collectivity in so far as it asserts a claim to social co-ordination with other collectivities within a comprehensive body politic.[1]

The necessity of the state, as also its possibility, lies in the fact that men, individually and in groups, do seek to co-operate, and are accordingly prepared to submit to a sovereign authority. They are prepared to abide by some method of settling differences. To define this method is to define what is for jurisprudence the legal sovereign. But to define it we must have a thorough appreciation

[1] Cf. *supra*, part ii, ch. i, p. 100.

of those differences. To regard them as interests only is to invite the inevitable conclusion of rationalism, an absolute sovereign state. To regard them as willed interests is to grasp the entire social fact of the struggle for right and to realize that juristic laws are always a compromise between the effort at self-assertion and the desire to co-operate, between the *de facto* conditions of social life and the aims of juristic idealism.

If we do not lose sight of this struggle for right in its full and vital meaning, we shall have to modify the absolute antithesis which Krabbe sets up between the personal and the impersonal.[1] The personal means for him the arbitrary, the subjective. The impersonal is the lawful, the objective. Only if the sovereign is impersonal—that is, only if the sovereign is the law itself—can we escape the caprice of arbitrary authority. If we press this antithesis of Krabbe's it must lead to the neglect of the social foundations of law, for these are ultimately human personality.[2] But if we preserve the element of will as a determining factor in legal relations, the antithesis between the personal and the impersonal becomes relative, and comes to mean the relative antithesis of the actual conditions of social life and the normative considerations of juristic idealism. It signifies that eternal conflict between the claims of realism and idealism, between what is and what should be—a conflict which implies relation as well as distinction. We must, accordingly, preserve the will, which presents the *de facto* and subjective aspect of social relations as a necessary element of the social fact which constitutes the foundation of law. We may then speak of the law as expressing relations between subjects of rights, relations which are dependent for their nature upon the real nature of those subjects and not upon abstract conceptions as to the nature of 'right'. Law is not a world of impersonal relations distinct from and independent of the world of personal relations. It is a peculiar construction of the world of personal relations, and unless it is constructed upon the foundations of a sound knowledge of the latter it cannot possess that reality which gives it a value for the conduct of human life.

To sum up, law has its foundations in social fact. Only a sound knowledge of social fact can enable us to achieve a sound jurisprudence. The analysis of social fact shows it to consist not merely

[1] Cf. *ibid.*, pp. 28 ff. and p. 35.
[2] Cf. *supra*, part ii, ch. ii, p. 132.

of interest but of willed interest. If we take into account both the elements of will and interest, we have a complete and vital grasp of the social reality which is the content of law. We are thus in a position to understand that struggle for right which Ihering saw to be the real scene of legal formation. In dealing with corporate bodies as well as in dealing with individuals we must include in the definition of their legal rights the element of will as well as the element of interest. Accordingly, we cannot dispense with the conception of corporate personality any more than with that of individual personality in the work of legal construction. The ascription of personality to a corporate body expresses both its aspect of 'interest' and its aspect of 'will', for it expresses not merely the fact of the common interest of its members but also the fact that it functions as if it had a common will in so far as it manifests an organization in which there appears a definite authority, a particular will, having within certain limits the power to act on behalf of the entire collectivity. The conception of corporate personality expresses both the moral aspect of a collectivity, in which it appears as serving a human interest, and the political aspect of it, in which it appears as an organized power. In short, it expresses the entire social character of a collectivity, and so enables us to preserve a thorough grasp of the social facts with which we are dealing in the juristic construction of the internal and external relations of corporate bodies.

This is more or less the view of those jurists whose work we shall discuss in the next chapter. It is accordingly submitted that they are on the high road of juristic thought in so far as they leave the way open for the construction of a jurisprudence which has its foundation in a sound sociology.

IV

THE DOCTRINE OF CORPORATE PERSONALITY: M. HAURIOU, L. MICHOUD, R. SALEILLES

Hauriou — his sociology — his jurisprudence — his *vitalisme social* — his Theory of the Institution and of the Foundation — its attempt to synthesize subjectivist and objectivist systems — its emphasis on importance of corporate institution as law-creating power — Hauriou's definition of the institution — his theory of corporate personality — his notion of *communion en l'idée* displaces Durkheim's *conscience collective* — Hauriou's reply to criticisms — his opposition to the *Willenstheorie* — his opposition to Ihering's theory of subjective right — his own theory an attempt at their synthesis — importance of Hauriou's work — its defects — its confusion of sociological and juristic issues — his theory of the institution a satisfactory *analysis* of the corporate body into its social elements — but not a satisfactory account of the juristic phenomenon of personification in which those elements are synthesized — value of Hauriou's Theory of the Institution — its influence on Michoud and Saleilles — their sociological jurisprudence — neither confuses sociological and juristic issues — their definitions of subjective right — reasons for preferring Saleilles's definition — Saleilles's theory of personality — appreciation of Saleilles's work.

AN original and stimulating attempt to found juristic theory on the results of sociological investigation is that of M. Maurice Hauriou, Professor of Public Law in the University of Toulouse. Though, like every sociologist, he owes much to the positivist school, he is far from accepting the views of Durkheim as to the province and method of sociological research.[1] He does not admit that science can unravel the ultimate mysteries of life and determine its final ends. Science is pure knowledge. Life uses knowledge; it is not one with knowledge. But if he emphasizes the limits of scientific thought, Hauriou does not hesitate to affirm its vital importance for life. Accordingly, he insists that our efforts at juristic construction, by which we seek to guide our social life, must be preceded by a scientific study of that life. Juristic theory, he holds, is concerned, first and last, with the organization of positive realities. It is not 'born in the air' but indissolubly bound up with earthly facts. The value and importance of social science lie in its demonstration of these facts, by which we are prevented from deducing juristic truths from empty, *a priori* abstractions.

As a sociologist Hauriou proclaims himself a pluralist.[2] His aim

[1] *La Science sociale traditionelle*, pp. 28 ff.

[2] *Principes de droit public* (1st ed.), Preface, pp. viii–x.

is to avoid any closed system which would paralyse thought and put *a priori* limits upon the work of social research. Accordingly, he discards the rigid determinism of Durkheim, and in its place he puts a determinism with multiple series, which allows of free spontaneity in the midst of contingent relations, by its frank recognition of discontinuity as well as continuity in nature.[1] The effect of this pluralistic hypothesis is, on the one hand, to limit the power of science, and, on the other hand, to extend indefinitely the field of its investigations, for it refuses science the power to enclose that field by the construction of any logical synthesis. Thus, Hauriou, as a sociologist, is a confirmed realist. Science, he holds, cannot reconstruct social life. It merely analyses that life and leaves it in the pluralistic condition in which it finds it. To direct social life by a constructive synthesis of its elements is outside the scope of science. In this matter science abdicates in favour of life. But this does not mean that reason itself disappears before the onrush of blind instinct. It means that reason must continue to operate through categories other than those of scientific thought. Social science, that is, must give way to jurisprudence or the philosophy of law. But again, Hauriou does not mean to cast empirical science aside and deal with the problems of juristic construction on the basis of an *a priori* philosophy. This would make but a mockery of his ardent research into the social foundations of law. On the contrary, he asserts, it is only after that research has been completed, and by working with its results, that jurisprudence can achieve that synthesis of social life which is its goal.

As a jurist, Hauriou never ceases to emphasize the practical interest of his problems and the practical character of their solutions. He defines the field of social investigation as 'a composite order of things, whose unity is realized only by practical synthesis'.[2] This definition is doubly significant. Firstly, it affirms the powerlessness of pure science to effect a synthesis of social life. Secondly,

[1] 'La Théorie de l'Institution et de la Fondation', in *La Cité moderne et les Transformations du droit*, Cahiers de la Nouvelle Journée, No. 4. Hauriou acknowledges his debt to an article by M. Chevalier, 'Le Continu et le Discontinu', in *Proceedings of the Aristotelian Society*, Supplementary Volume IV (1924), pp. 170–96. *Vide* also Gény's remarks in *Science et Technique en droit privé positif*, Part II, p. 101.

[2] *Recueil de législation de Toulouse*, 1911, 2e series, vol. vii, p. 15. (Quoted by Gény, *ibid.*, ii, p. 101.)

it implies what Hauriou continually emphasizes, that the work of the jurist is not so much the construction of logical theories as the practical synthesis of those elements of social life which scientific research brings to light.[1] Now, this emphasis on the practical rather than the logical aspect of solutions to juristic problems is highly important for the understanding of Hauriou's jurisprudence. It signifies more than a peculiarity of temperament. It explains why he insists on the close connexion between jurisprudence and sociology. Jurisprudence must get its data from sociology, for it is concerned, not with mere logical form, nor with mere ideas, but first and last with *activity*.

Accordingly, no better expression could be found for Hauriou's work than that which he himself uses to describe his Theory of the Institution: *un essai de vitalisme social*.[2] Law is, for him, a natural and necessary phenomenon of social life. It is an expression of that life, and it cannot be understood without a vital understanding of the positive realities which make up society. Thus Hauriou finds the starting-point of juristic thought, not in the logical analysis of abstract conceptions (Stammler), nor in the abstract notion of legal value (Krabbe), but in the concrete analysis of social fact. In order to understand the real nature of legal phenomena, we must consider not their formal character alone but their social contents as well. It is, Hauriou says, a question of knowing where in society lies the creative power which is behind the birth of social phenomena, of which the law is a particular example. He therefore sets out from the question whether it is the rules of law that create institutions—i.e. corporate organizations—or whether it is not rather the institutions that engender the rules of law by virtue of their inherent power of government.[3] Duguit and Krabbe think that the rules of law create institutions, that they have a formative creative power. Hauriou takes the opposite view and charges Duguit with confusing what are two distinct elements of social life, the objective element of duration or continuity with the subjective element of action or creation. He supports this criticism by a brilliant and original sociological analysis.

Hauriou analyses the component elements of living society into two classes, the subjective and the objective. The subjective elements are the creative elements, the actors in the drama of social

[1] *Principes de droit public*, Preface, pp. viii ff.
[2] *La Théorie de l'Institution et de la Fondation*, p. 45. [3] *Ibid.*, p. 7.

life. They are the individual human beings on the one hand, the corporate institutions on the other. Without these there can be no society, for they alone supply the creative power without which there is no life. But these elements are not sufficient by themselves to constitute a society. Not only corporate action but also continuity of group life is essential to the existence of society. This is what the objective elements, the rule of law, the social environment, the public order, sustain. Subjectivist systems, like those consecrated by the doctrines of the French Revolution, neglect the objective elements. They mistake, Hauriou says, action for duration. Objectivist systems, such as that of Duguit, neglect the subjective elements. They mistake duration for action. Hence Hauriou puts forward his *Theory of the Institution and of the Foundation* which succeeds historically the subjectivist and the objectivist systems 'and finds its basis in an account of the foundations of institutions, which these systems have both failed to give'.[1]

Hauriou is profoundly convinced that the most important juridical reality, the most important creative power in society which engenders legal rights, is not the individual but the corporate institution. Undoubtedly, this conviction is born of an historical survey of legal development. Law was originally developed not by the conscious efforts of individuals but as the product of more or less rudimentary organizations. Historically the group comes before the individual as a subject of right. It is in early society superior to its living members, who do not claim imprescriptible rights over and against it as do the members of a modern associate group.[2] No one who has any appreciation of and respect for the historical side of law can object to Hauriou's emphasis on the institution as the most potent of all the powers that engender law. Nor does the history of recent juristic development tend to lessen this emphasis. The growth of companies, trusts, professional organizations and the infinite varieties of corporate life which modern society portrays, lends additional weight to any theory which considers the institution as a more important factor in juridical organization than the single individual. And, indeed, most modern jurists support this view. Gierke, Jellinek, Duguit,

[1] *La Théorie de l'Institution et de la Fondation*, pp. 9–10.

[2] Cf. St. Paul, 1 Cor. xii. 12, 'For as the body is one, and hath many members, and all the members of that one body, being many, are one body . . .' Cf. also 1 Cor. xii. 25–7.

Krabbe, Michoud, and Saleilles, not to mention many other leading jurists, each in his own way considers the corporate institution as a superior juridical reality to the individual. But the very fact that these jurists can all be considered to agree on this point is itself sufficient to show how general it is in its meaning and what different conclusions it can lead one to accept. While, therefore, it may be said to be the general theme of Hauriou's theory of the institution, it is far from an account of its vital meaning as a finished theory of the sociological foundations of juridical organization.

This meaning is to be sought in the attempt it makes to synthesize the subjectivist and objectivist accounts of society. Hauriou does not mean to exclude the subjective element of the individual will and consciousness as a positive factor in the formation of society. His hypothesis of discontinuity in nature is expressly intended to avoid the inevitable conclusion of any rigid determinism, that the individual will and consciousness are mere epiphenomena which do not affect the course of social life. What Hauriou means by his emphasis on the corporate institution is that the individual will and consciousness assert themselves as positive factors in social life first and more effectively through corporate organizations in which they co-operate with other wills and consciousnesses, rather than as single individuals. His theory of the institution does not find the foundations of society in any objective reality distinct from the individual human being. It insists above all that the institution is founded on *action* which has its source only in the individual, and that it is therefore composed of subjective as well as objective elements.

Hauriou defines the institution as follows: 'An institution is (1) the idea of an undertaking or enterprise which is realized and persists juridically in a social environment; (2) for the realization of this idea a power is organized which procures organs for itself; (3) further, between the members of the social group concerned with the realization of the idea (1) arise expressions of communion directed by the organs of the aforesaid power (2) and controlled by definite rules of procedure.'[1] There are two types of this

[1] *Ibid.*, p. 10, '. . . une institution est une idée d'œuvre ou d'entreprise qui se réalise et dure juridiquement dans un milieu social; pour la réalisation de cette idée, un pouvoir s'organise qui lui procure des organes; d'autre part, entre les membres du groupe social intéressé à la réalisation de l'idée, il se produit des manifestations de communion dirigées par les organes du pouvoir et réglées par des procédures.'

institution, those which are personified (*institutions-personnes*) and those which are not personified (*institutions-choses*). The typical example of the former is the state as a subject of right.[1] The typical example of the latter is the rule of law.[2] Thus the problem of the relation between law and state is considered by Hauriou in the sphere of their operation as social forces. Whatever may be the weakness of his sociology and jurisprudence, his point of view is commendable when compared with the formal rationalism of the neo-Kantians. It is first and foremost concerned with grasping the positive realities at the foundation of the juridical life of society, and with showing how juristic constructions are bound up with the inherent character of the social facts which they construe.

We shall not consider in detail the subtle analysis which Hauriou makes of the foundations of society. What immediately concerns us is the account he gives of the phenomenon of personification which arises in the juristic treatment of corporate life. Corporate personality is, for him, something real. It is not merely an artificial device of the lawyer. It is a natural and spontaneous phenomenon of social life.[3] But while he holds that corporate personality is a social fact, he does not thereby maintain the existence of a collective will and consciousness such as the organic theory implies.

That Hauriou has no leanings towards the conclusions of the organic theory is obvious from the pluralistic hypothesis upon which he proceeds in his social researches. The frank recognition of discontinuity in nature is incompatible with the systematic construction of the organic theory. Hauriou never asserts, nor does he ever mean to assert, the existence of any will and consciousness other than those of the individual human being. But he does hold, nevertheless, that the corporate personality of an institution is not merely a matter of law but also a matter of fact, that it is a natural phenomenon of social life.[4]

To appreciate his account of this phenomenon we must observe carefully his definition of the institution. It includes three elements. Firstly, there is the idea of some enterprise, which corresponds to the element of interest which we have spoken of in

[1] *La Théorie de l'Institution et de la Fondation*, p. 26.

[2] *Ibid.*, p. 11.

[3] *Ibid.*, p. 28. Cf. *Précis de droit administratif et de droit public* (10th ed.), p. 86.

[4] Cf. Geldart, *Legal Personality*, pp. 7–8: 'We cannot evade the legal question by treating legal personality as something which has no relation to the personality which is not matter of law but of fact.'

defining subjective rights.[1] Secondly, there is the element of an organized power at the service of the interest; this element is contributed by the wills of those who pursue the interest. Thirdly, there is a communion between the members of the group who pursue the common interest. From this 'triple movement' there is born a corporate institution which, Hauriou maintains, has a personality in fact as well as in law. The three parts of this movement he calls *interiorization*, *incorporation*, and *personification*.[2] By virtue of the process of *interiorization* a common interest is born in the minds of a number of individuals. By virtue of the process of *incorporation* these individuals organize themselves so as to produce an organized power of government which is at the service of the common interest.[3] And by virtue of what Hauriou does not hesitate to call the process of *personification* the members of the organized group manifest a communion or participation in the common interest, in the idea of the enterprise for the realization of which the organized group comes into being.

Hauriou thus puts the notion of *communion en l'idée* in place of Durkheim's *la conscience collective*.[4] Personification is the result of a real subjectivization of the common interest which is the bond uniting the members of the corporate body. The communion of the members in the common interest is not the result of a kind of hypnotic coercion, as the theory of the collective consciousness must explain it; it is a communion of action. It involves the positive effort of the individual, and calls forth not merely intellectual agreement but also the will to act. It engages his whole being in the common cause. That is why the communion in the common interest is a communion of action, and because it is a communion of action, involving the creative power of will which is possessed by the individual, it gives the corporate institution in which it takes place a real juristic personality (*personnalité morale*). Thus the mere incorporation of an institution, which produces within it a power of government, is not in itself sufficient to give the

[1] By the 'idée de l'œuvre' Hauriou means 'l'idée directrice de l'entreprise', which includes both the end to be realized and the means of its realization. *La Théorie de l'Institution et de la Fondation*, pp. 12–13.

[2] *Ibid.*, p. 21.

[3] *Ibid.*, p. 17. The forces behind the process, says Hauriou, are entirely spiritual. The two basic principles of the process are the separation of powers and representative government.

[4] *Ibid.*, p. 21: 'La communion en l'idée, c'est Ariel, la conscience collective, c'est Caliban.'

institution a personality. This happens only when the institution achieves political liberty, when its members really participate in its government. Only then does the directing idea of the institution become subjectivized by passing into the consciousness of each and all its members.[1] And so the institution takes on the attributes of personality which enable it (1) to give expression to its directing idea, (2) to put itself under obligations, and (3) to put itself in the domain of subjective responsibility.[2]

Thus Hauriou finds in the natural and spontaneous facts of social life the foundations of juridical organization. He discovers personality, the foundation of legal subjectivity, not merely in the individual, but also in the corporate institution, where there is no single unitary will and consciousness of the collectivity, but a plurality of distinct wills and consciousnesses. He notes and deals with the difficulty pressed by critics, that the discontinuity of the will and consciousness of one member of the institution with those of the other members makes it impossible to see how the subjective continuity of the directing idea is maintained in and through the expressions of communion. The problem is, of course, a psychological one, and Hauriou's immediate reply is to the point. He shows how there is the same difficulty in explaining the subjective continuity of the individual person as a moral subject. The individual too has discontinuous states of consciousness. This consciousness is interrupted by sleep and syncopes. So similar is this discontinuity in the conscious life of the individual to that in the subjective life of a corporate institution, that Hauriou finds it possible not only to treat corporate bodies as persons on the analogy of the individual person, but even to treat the individual as an institution on the analogy of the corporate institution.[3] Hauriou propounds an interesting psychological theory to explain how in either case a continuity in life is preserved in spite of discontinuity in the consciousness which directs it.[4] But this theory need not concern us here. It is sufficient to dispel the above objection against the theory of corporate personality to point out that the same objection can be brought against the theory of individual personality, which neither psychologist nor jurist would care to do. It shows that the subjective continuity of the directing idea of an institution is and must be somehow rendered possible, as it

[1] *La Théorie de l'Institution et de la Fondation*, p. 26.
[2] *Ibid.*, p. 28.
[3] *Ibid.*, pp. 23–5.
[4] *Ibid.*, pp. 30 ff.

is in the case of the individual person. We recognize a subjective continuity of the individual, though we cannot perhaps give an adequate psychological explanation of it. The fact remains for us even if it is not explained by theory, and the business of life proceeds without that theory. So long as we can observe a similar continuity in the life of a corporate institution, we are entitled to recognize the subjective continuity of its directing idea without having to explain how this is psychologically possible. Now this continuity in the life of an institution is a fact which no one will deny, in spite of the sporadic manner in which it manifests itself through elections, deliberations, polls, &c. To recognize this fact, and to take it into account as an element of the entire reality which constitutes the institution, is all that the jurist need do in considering the social foundations of juridical organization. This is what Hauriou's theory of the institution has done.

Now, his theory is opposed to the *Willenstheorie*, for it does not identify the legal subject with the power of will.[1] Hauriou shows that if the *Willenstheorie* were the whole truth, then the legal subject could not be held responsible, nor enter into obligations, nor indeed express itself coherently, for the power to will, in spite of its elasticity, could not in itself effect a continuity in its expressions.[2] This it can do only by operating in the service of a directing idea. Thus the legal subject is not a power of will, but a power of will at the service of a directing idea.

But Hauriou's theory is also opposed to theories like those of Ihering, Duguit, and Krabbe, which do not include the subjective element of will in their accounts of the social content of juridical reality. 'Right', he asserts, 'is born only of action.'[3] There is no action without the exercise of the subjective element of will. Rights, therefore, whether of the individual or of the corporate institution, are not 'legally protected interests'. These interests require active wills at their service in order to engender legal rights. Thus corporate rights require the subjective personality of the corporate body which is sustained by the communion of its members in the common interest, and this, Hauriou emphasizes, is a communion of action, that is, a communion of active wills.

[1] *Ibid.*, pp. 31–2.

[2] Cf. his psychological theory of the subjective continuity of the individual. *Ibid.*, pp. 30 ff.

[3] *Principes de droit public*, p. 197.

Hauriou's theory of the institution presents a synthesis of the subjectivist and objectivist theories. Against the former, it denies that legal right is a mere fiat of will. Against the latter, it denies that the objective rules of law create rights and are the most important elements in a juridical organization. It asserts emphatically that the important elements are the juridical actors: the individuals on the one hand, the corporate institutions on the other,[1] and of these the latter are the more effective. To these the rules of law are inferior, for they have not, *qua* directing ideas, sufficient life to organize around themselves a corporation which is their own and in which they express themselves. They are only limiting ideas. They are not ideas of enterprise and creation. They do not engender action; they merely limit it. Those ideas which succeed in embodying themselves in corporate institutions sustain both action and continuity. Those ideas which do not embody themselves in corporate institutions, such as the rules of law, sustain only continuity.[2] They cannot create; they merely preserve. Hauriou therefore concludes that the rules of law do not create corporate institutions, but rather corporate institutions create the rules of law—a conclusion which is the opposite of that drawn by Duguit and Krabbe.

We have thought it necessary to give this account of Hauriou's theory of the institution for two reasons: it has had a vital influence on two jurists whose work, for the most part, calls for our approval, and it is in itself a most valuable account of the social foundations of juridical organization. M. Gény does not exaggerate when he writes: 'The studies of M. Hauriou, taken all in all, present the most frank, decided and complete effort that has yet been made on behalf of a direct and constant influence of sociology on law, or, we may say, of a juristic use of sociology'.[3] But M. Gény finds it necessary to admit that its results are not entirely satisfactory, and following the line of inquiry in which he is specially interested, he finds the reason for Hauriou's failure in his sociological method. It is too loose, too passive in its analytic treatment of social life. As Gény points out, it leaves society in the pluralistic chaos of varieties, antitheses and balances in which it finds it, without producing any synthetic laws by which its unifying organization can be achieved. Hauriou's sociology is essentially descriptive and

[1] *Principes de droit public*, p. 44. [2] *Ibid.*, p. 44.
[3] *Science et Technique en droit privé positif*, Part II, p. 108.

observational; it does not provide practical directions for the reorganization of the data which it brings to light. Gény explains this by suggesting that Hauriou's vivid sense of the complexity of social life has paralysed his constructive powers. 'In his case, the sociologist has turned the jurist aside from his most essential mission, which is to direct life imperatively.'[1]

This estimate of Hauriou's work by a most careful and profound critic refers to the sum total of his efforts both as sociologist and as jurist. It thus surpasses the limits of our present interest in Hauriou's work, which is restricted to his theory of the institution. But it nevertheless expresses a defect in Hauriou's thought, the effects of which are also evident in his account of the foundations of institutions. In it Hauriou does not distinguish clearly between the results of scientific observation and the technical construction which the jurist makes in the interest of his juristic aim. Gény complains that he is always mixing up the artificial considerations of jurisprudence with the direct observations of social facts.[2] It is just for this reason that his theory of the institution fails to be a satisfactory theory for the sociological jurist.

Now, Hauriou's theory has the merit of being a comprehensive account of the elements of social life. It excludes neither the subjective elements, the elements of action, nor the objective elements, the elements of duration or continuity. It thus provides a complete catalogue of the elements with which the jurist must deal in his synthetic construction of social life. But it cannot be considered to stand for more, and Hauriou errs when and in so far as he thinks it does. It is, as he admits, based entirely on the direct observations of positive psychology.[3] It analyses the facts of social life from the standpoint of causality. Though Hauriou discards the rigid determinism of Durkheim and puts in its place a determinism with multiple series, a sort of indeterminate determinism, he remains in principle a positivist, for his account of social phenomena considers them in terms of the relations between natural causes and their effects. It cannot, therefore, produce a synthesis of their elements. This we can achieve only if we join to the scientific account of them the teleological account of their ideal tendencies. Where Hauriou makes his theory stand for more than an analysis of social facts and sees in it the expression of a

[1] Gény, *ibid.*, p. 109.
[2] Gény, *ibid.*, p. 109.
[3] *Précis de droit administratif*, p. 86, esp. n. 1.

juristic ideal, as when he says that it supports a doctrine of national sovereignty and liberty, and not of despotism[1]—there he introduces into the purely scientific account it gives of social phenomena ideal considerations of which it does not and cannot treat. The result is a confusion of positive facts with normative values, of the causal operation of positive realities with the teleological direction which the constructive syntheses of the jurist give them. And the confusion has dangerous consequences.

For us, the most important of these is that it leads to the view that the institution, as an objective reality, is something distinct from its personality as a legal subject. For it holds that institution precedes personality, and it thus cannot but place all the real elements in the objective individuality of the institution, and reduce the legal subject, the personality of the institution, to a purely juristic entity or fiction. Hauriou admits that this was the unfortunate result of the first account he gave of his theory of the institution in the first edition of his *Principes du droit public* (1910).[2] In the second edition of the same work (1916) he, therefore, attempted to provide a substratum of reality for the personality of the institution, the legal subject. He identified it with 'the group of those interested in the idea of the enterprise' for the realization of which the corporate institution exists, and contrasted it with the objective individuality of the institution which he reduced to being no more than the ensemble of governmental organs. But still the priority of institution over personality made itself felt. Hauriou was forced to admit that the rights of the corporate person appeared as derivative from the objective individuality of the institution. Subjective law appeared as derivative from objective law, for, while it was possible to explain how the corporate person was bound to obey the ruling power of the governmental organs of the institution, it was not clear how it could react on them. Hauriou, therefore, makes a third attempt to overcome the consequences of the view that institution precedes personality. He explains that the corporate person *appropriates* the governmental organs of the institution. The group of those interested in the idea of the corporate enterprise, who are one with the corporate person, participate in the government of the institution, with the result that the corporate person is no longer merely subordinate

[1] *Précis de droit administratif*, p. 89, note.

[2] Also in his *La Souveraineté Nationale* (1912).

to the organs of the institution, but itself directs their actions. Thus, the state takes on personality in so far as the nation appropriates the governmental organs, that is, in so far as the nation becomes sovereign. The relations between the person of the state and its organs exercise a ruling power over the corporate person, and the corporate person replies by appropriating the organs.[1]

Now this third theory is extremely suggestive and illuminating, and we do not wish to deny its truth as an account of what actually happens in the political life of a social group when it takes on the juristic character of corporate personality. But what we do deny is that these actual events by themselves can explain the juristic structure of corporate persons. Hauriou's account deals with facts, not with values, and it cannot therefore stand as the juristic account of corporate institutions. It describes the historical events in the growth of a corporate institution, and it cannot avoid the priority of one element over another. If we do treat it as an account of the juristic character of corporate institutions, we must accept the derivation of subjective rights from the objective law, for it makes the latter prior to the former. It makes the institution go through the objective stage before it reaches the subjective stage.[2] This conclusion, and the many other conclusions which follow from the theory that institution precedes personality, need not however be drawn, if we do not make the theory account for more than it can. It is sound as an account of the social elements of institutions. It is a thorough *analysis* of the social foundations of institutions, but it does not and cannot explain their synthesis, with which the jurist is concerned. The scientist can regard one element as prior to and separate from another. The jurist cannot. For him these elements must be elements within a whole. His interest in them is synthetic, and he pursues his interest not only by means of the scientific category of causality, but also by means of the category of teleology. The constructions he puts upon social facts are, therefore, not to be identified with any natural facts which the direct observations of positive psychology demonstrate. They are certainly concerned with these facts which are their data. But they are not merely descriptions of them. They have an ideal as well as an actual reference, and that is why they cannot be got from a purely scientific account of the elements of social institutions. As we have

[1] *Précis de droit administratif*, p. 88 note.

[2] *La Théorie de l'Institution et de la Fondation*, p. 10.

insisted throughout this work, this scientific account is the essential prelude to any jurisprudence. It enables the jurist to grasp all the social elements which enter into the content of his judgements. But it does no more. Their synthesis involves a selective effort of the mind working with the category of teleology. It is an intellectual construction which has an ideal as well as a real or natural aspect. It has a real aspect in so far as it is a construction of facts, and so has its foundations in fact; it has an ideal aspect in so far as it is more than a description of those facts, and sketches their synthesis in an ideal system of relations. It cannot, therefore, be equated with any actual fact or facts, revealed by positive psychology. That is why the scientific account of the foundations of institutions, which makes institution precede personality, does not define their juristic relation. Their juristic relation is determined not merely by the actual conditions which the natural operation of social forces impose, but also by the constructive demands of juristic idealism.

It follows that Hauriou confuses the scientific and the juristic accounts of the institution when he speaks of its personality as 'a natural and spontaneous phenomenon'. We have discountenanced, and shall continue to discountenance, any attempts to treat the personality of a group as a social fact.[1] The conception of group-personality is and has always been the *enfant terrible* of the sociologist. It is, however, a valid and, indeed, indispensable conception for the jurist, because, as a juristic conception, it does not stand as the description of an actual social fact, but as an ideal construction of social facts. Hauriou has not kept clear the distinction between scientific and juristic considerations in his theory of the institution. He has carried a juristic conception over into the field of scientific social observation and sought to discover it there as a positive fact. Hence his discovery of the 'phenomenon of personification', a fact revealed by the observations of positive psychology. He identifies the personality of the corporate institution with the fact of a really subjectivized interest. And by the demonstration of this fact he holds that he has proved the reality of corporate personality, by which, therefore, he means its actuality as a positive fact [2]

[1] *Vide supra*, part ii, ch. ii, p. 127. Cf. Hobhouse, *Social Evolution*, p. 215; also his *Metaphysical Theory of the State*, p. 131.

[2] Hauriou, it is true, draws a distinction between moral personality (*person-*

Now Hauriou is right in holding that the personality of an institution has a 'substratum of reality'. If it had not, it would be a pure fiction, as Duguit thinks it is. But this must not lead us to identify the personified institution with its 'substratum of reality'. In itself the 'substratum of reality' is not a person, moral or juristic. It is merely a 'composite order of things', to use Hauriou's own language, 'whose unity is realized only by practical syntheses'.[1] And these syntheses are conceptual, that is, they are the result of an intellectual construction which the jurist puts upon the 'composite order of things'. In this construction he is guided not only by the results of a scientific observation of social life, but also by a consideration of the ideal aim of juridical organization. Such a construction is the personality of a corporate institution, and it is thus not a social reality but a juristic reality. Its reality is not the reality of a fact but of an ideal. But it is real and not fictitious for the jurist, because it is essential to the realization of legal organization in the life of society.

To sum up these criticisms of Hauriou's theory of the institution: we accept it as an analysis of the social elements of the institution, for it includes both the subjective elements and the objective elements. We do not, however, accept his identification of the personality of the institution with any actual reality revealed by positive psychology. The personality of the institution is the result of a constructive interpretation of the social elements of the institution. It is an ideal synthesis of them. We agree that it must be a *practical* synthesis, in so far as it is a synthesis of empirical realities. But it is not a synthesis achieved without the constructive work of reason. And, most important of all, in this synthesis the elements of the institution as a social fact are considered not as prior to one another, but as interrelated elements within a whole.

nalité morale) and juridical personality (*personnalité juridique*)—*Précis de droit administratif*, p. 86, n. 2; and *Leçons sur le Mouvement Social*, p. 146; and *Précis de droit constitutionnel* (1923), pp. 715 ff. But the distinction is not a material one, for he says that the juridical personality of an institution has the same basis of reality as its moral personality. It is only a retouched and re-fashioned form of the moral personality.—*La Théorie de l'Institution et de la Fondation*, p. 43. French jurists usually mean the same by the two terms, and most of them prefer to use the term moral personality, for the term juridical personality applies also to the individual and is thus too wide. *Vide* Michoud, *La Théorie de la Personnalité Morale*, vol. i, p. 1, n. 1. This note gives an account of the usage of the two terms in French law and jurisprudence.

[1] *Vide supra*, p. 219, n. 1.

In short, the personality of an institution is not observed by positive science; it is *recognized* by reason operating in the interest of juristic idealism.

Accordingly, the institution, as a juristic reality, has two sides. It can be viewed as a social fact, and, as such, it is the object of scientific observation from which we get an account of the actual forces which produce the union. Or, it can be viewed as a legal form which is drawn up by the state in order to realize the ideal of the lawful organization of society: in order, that is, to safeguard public and private interests.[1] Only if we have a sound understanding of the former can we truly appreciate the latter. Hauriou's theory of the institution, though by no means final, is satisfying as an analytic account of the positive realities which produce the institutional organization, for it includes all the elements. But it is not a juristic theory of the institution. The 'personality' which it discovers as a 'natural and spontaneous phenomenon' in the social fact of the corporate institution is the real substratum of the juristic personality of the institution. It is the 'stuff' of which the juristic person is made. But it is not one with the juristic person. Only when it has been taken up by the jurist and construed in accordance with the demands of legal order and justice, is it transformed from a social force into a subject of right, from a 'composite order of things' which the scientist observes into a person at law through which is expressed an ideal synthesis of the elementary forces of social life.

The great value of Hauriou's theory is that it avoids the untenable idea of a collective will and consciousness. It puts a *communion en l'idée* in place of Durkheim's *conscience collective*. It thus makes the institution rest upon a substratum of interrelated wills. It preserves the individual as well as the social elements of the corpus, and so does away with the idea that the institution is something apart from, and has an existence independent of, its members. Furthermore, by its exclusion of any collective will and consciousness, it has rid the jurist of the difficulty with which the organic theory has always had to contend. For it is no longer necessary to show how there can be a collective will and consciousness when there are only individual wills and consciousnesses. The power of will is an *element* of the social reality of the corporate institution,

[1] Cf. Sir Paul Vinogradoff's interesting article on 'Juridical Persons' in *Columbia Law Review*, June 1924.

and it is contributed by the individual. Hauriou thus makes the way clear for a theory of corporate personality which, though it retains the will as an essential element of the subjective rights of the corporate person, yet does not require that this will should be identical with the wills of those who are the titulars of the rights. This theory has the support of two of the most learned and profound French jurists—Léon Michoud[1] and Raymond Saleilles.

To give the works of these jurists the treatment which they deserve would prolong this treatise into exceeding its limited purpose. Many of their ideas have already been expressed, directly or indirectly, in previous chapters. Moreover, they are so essentially in agreement that to record their views separately would be to court an unnecessary monotony.[2] We shall, therefore, use their works only for the purpose of bringing to a head the various matters discussed in this treatise, and so conclude our survey of the views held by modern jurists in regard to the doctrine of corporate personality and the bearing it has on the question of the relation of law and state.

Both Michoud and Saleilles are sociological jurists, for both treat juristic problems as essentially social problems. While they are clearly aware of the social construction which the jurist puts upon social facts, and thus do not identify what is real for him with what is real for the social scientist, they are also insistent on the need of studying the actual nature of the social facts which the jurist thus construes.

In regard to the elements of social phenomena, they are both in agreement with Hauriou's theory of the institution.[3] They

[1] Of Michoud's work M. Gény has said that it came 'comme un phare lumineux au milieu des brouillards dont la matière reste enveloppée'.

[2] The works of both jurists should, however, be read, for if their conclusions are essentially the same, their treatments of the problem differ. Michoud approaches it from the question of subjective rights. His work is sociological and dialectical. Saleilles is first and foremost an historian, and he approaches the problem from the historical side. His *de la Personnalité Juridique* is the most valuable account of the history of the problem both in legal practice and in juristic theory.

[3] Though note Michoud's criticism of Hauriou's theory of the institution that it is too wide to be of any real utility from the strictly juristic point of view.—*La Théorie de la Personnalité Morale* (1st ed.), vol. ii, pp. 28–9. It 'includes that which cannot be led back to the idea of contract'. This objection does not arise out of any contention of Michoud that the corporate institution is a purely contractual relation. Michoud holds that the corporate institution is formed by a contract, but is not itself a contract.—*Ibid.*, vol. ii, p. 20. The objection is directed against the errors which arise from Hauriou's theory if it is considered

include as the social elements of legal rights both the element of interest and the element of will. Their definitions of subjective right present a synthesis of the *Willenstheorie*, which excludes the element of interest and defines the subjective right as a power inherent in the will, and Ihering's theory, which excludes the element of will and defines the subjective right as a protected interest. Accordingly, their juristic systems present alike a synthesis of the individualistic theories, which ignore the social side of the juristic problem, and the objectivist or collectivist theories, which lead to state-absolutism through their denial of the part played by the individual in the formation and process of social life.

They object to the *Willenstheorie* on the ground that the protection of the will is not the end which law has in view. They agree with Ihering that the law protects the interest and not the will. But they disagree with him in so far as he regards the will, which is put at the service of the legally protected interest, as an unessential element of subjective right. If the interest is what the law protects, the will is the essential means whereby its realization is effected, and because it is thus indispensable to the realization of the end which the law has in view, it is an essential element of the subjective right which the law declares when it protects the interest. Ihering's theory, as we have shown, leads to state-absolutism, because it leaves the protection of interests to the state.[1] It does not indicate the means whereby the attainment of the interest is to be achieved, with the natural result that the means is ultimately found in the strongest power, the power of the state. By insisting that the will at the service of the interest is an essential element of the subjective right, Michoud and Saleilles include not only the end which the law has in view, but also the means of its attainment.[2] By joining to the interest an autonomous power of will at its service, they avoid the risk of confining the guarding of the interest, the guarantee of its realization, to the state—which, as

to be more than a scientific analysis of the elements of social phenomena. We have pointed these out, especially the dangerous consequences which result from the view that institution precedes personality, namely, the institution becomes something separate from the juristic person as the result of which there follow special social and juridical effects. But it is only as a scientific *analysis* of the social phenomenon of institution that we are accepting Hauriou's theory, and as such it is also acceptable to Michoud and Saleilles.

[1] Cf. *supra*, part iii, ch. ii.

[2] Cf. Michoud, *ibid.*, vol. i, pp. 101 and 110. Cf. also Michoud's article in *L'Œuvre juridique de Raymond Saleilles*, p. 331.

Duguit's theory shows, leads to the total negation of subjective right.

But they do not hold that the power of will put at the service of the interest must necessarily belong to the subject for whose benefit the interest is legally protected. If that were so, one would have to show that corporate persons have a real collective will. Moreover, it would be impossible to explain how lunatics and children, who are not supposed to have wills, can be subjects of right. As in their cases the power of will can be supplied not by the titulars of the right, who are the lunatics and the children, but by a guardian, so in the case of corporate persons it is not necessary that they should have a real collective will to put at the service of their interests.[1] This can be supplied by an individual acting as the organ of the corporate body. As the child or lunatic remains the titular of its rights, so the corporate person remains the titular of its rights, though these are exercised by an individual acting on its behalf. Michoud and Saleilles thus admit the contention of those who bring against the notion of a collective will the criticism that there is only one real will, the will of the individual human being. But they nevertheless insist that there can be no right, individual or corporate, where there is not a power of will at the service of the interest which the right protects. For the right is not an inert force, but something living.[2] In point of fact it is above all a power to do something, a power of acting. To see right where there is no power of will would be to deny what every vital jurisprudence must recognize, that right is born only of action.[3] Law serves no real purpose in protecting interests for which there is no means of realization, that is, in maintaining rights which cannot be exercised. Hence it is only if an interest has a power of will at its service that it can be a candidate for legal protection.

But neither Michoud nor Saleilles hold that the mere fact of an interest with a will at its service is sufficient to produce legal right. Before the fact can receive legal consecration a value must be imputed to it, and this transformation of the social fact into a legal value is produced by its adaptation to the social whole.[4] Law is not a mere statement of fact; it is a judgement of value. It is

[1] Saleilles, *de la Personnalité Juridique* (2nd ed.), pp. 505 and 548.

[2] Saleilles, *ibid.*, p. 546.

[3] This is indeed the main theme of Hauriou's *vitalisme social*.

[4] Saleilles, *ibid.*, p. 359. Cf. also p. 557. 'Everywhere right has its source in organizing force, in force transformed into social value.'

determined not merely by the pressure of facts, but also by the teleological considerations of juristic idealism. For, as Michoud and Saleilles always insist, the aim of law is social.[1] Thus the recognition of rights is controlled not merely by the fact of human activity but also by the consideration of its social end. 'Without a theory of the abuse of right', says Saleilles, 'the notion of subjective right merits all the reproaches of Duguit.'[2] In short, an interest with a power of will at its service involves a subjective right only if the interest has a social character, that is, only if it admits of harmonious adaptation to the social whole in which it operates as a living force.

We can now see the full import of the definitions which Michoud and Saleilles give of subjective right. According to Michoud, 'the subjective right is the interest of a man or of a group of men juridically protected by means of the power to represent and defend it which is attributed to a will'.[3] Unfortunately, this definition does not emphasize the social character of the interest which the law will protect. But Michoud means this to be understood.[4] Saleilles's definition is preferable, for it mentions this point explicitly. It runs as follows: 'The subjective right is a power put at the service of interests which have a social character, and exercised by an autonomous will.'[5]

These two definitions differ on another point. Although it is only a difference of emphasis, it is worth noting. Saleilles sees the essence of the subjective right in the power (*pouvoir*) given by the law to the will which serves the protected interest. Michoud puts the interest first and sees in it the essence of the subjective right. Saleilles objects to Michoud's order on the ground that to speak of the interest first is to envisage the right by its abstract end (but) and not in its concrete activity.[6] Michoud replies that there is no real difference between their definitions except one of detailed emphasis which is not worth debating.[7] But even so the difference

[1] Saleilles, *de la Personnalité juridique*, p. 550.

[2] Saleilles, *ibid.*, p. 547.

[3] Michoud, *ibid.*, vol. i, p. 105: ' . . . l'intérêt d'un homme ou d'un groupe d'hommes juridiquement protégé au moyen de la puissance reconnue à une volonté de le représenter et de le défendre.'

[4] Michoud, *ibid.*, vol. i, pp. 108–9.

[5] Saleilles, *ibid.*, p. 548: ' . . . le droit subjectif est un pouvoir mis au service d'intérêts de caractère sociale, et exercé par une volonté autonome.'

[6] Saleilles, *ibid.*, p. 546.

[7] *L'Œuvre Juridique de Raymond Saleilles*, p. 331, n. 2. Cf. Michoud, *La*

is surely important if the definition of subjective right is to be used as a guiding principle for legal practice and legislation. It is important that the emphasis should be on activity rather than on abstract purpose. We have insisted elsewhere on this point as important for a vital appreciation of the 'struggle for right' through which the law is born.[1] Accordingly, we prefer Saleilles's definition, firstly, because it emphasizes the social character of the interests which the law protects, and secondly, because it envisages the right in its activity as a living power. The theory of corporate personality which Saleilles develops along with his definition of subjective right is in essentials the same as that which Michoud supports. But for the same reason that we prefer the former's definition of subjective right we prefer also his account of corporate personality. We shall, therefore, deal only with his account.

Just as the bare fact of an interest with a will at its service does not itself constitute a subjective right, so, Saleilles holds, the personality which is the subject of that right is not to be identified with any natural fact. He issues a warning against identifying legal personality with human personality.[2] The latter is an observable fact, the human body with its single centre of consciousness. The former is not an observable fact; it is a juristic construction. Its reality is not 'de facto' but 'de jure'. It is not a fact revealed by the observations of positive psychology, but a juristic interpretation of social facts. It has its foundation in fact, for its elements are social and empirical. But these elements constitute a legal person only if they are organized in a certain manner. If they are so organized as to constitute a being capable of investment with a power constitutive of subjective right, then they constitute a person in the juristic meaning of the term.[3] Thus personality does not mean an abstract *relation*. Saleilles criticizes Binder, who confuses personality with subjectivity which he defines as a relation.[4] In order that there may really be a power such as a legal right declares, there must be a motive force. Otherwise the power

Personnalité Morale, i, p. 80: '. . . le droit n'est pas fait pour une entité abstraite et métaphysique; il est fait pour l'homme réel.'

[1] Cf. *supra*, part iii, ch. ii, p. 187.

[2] Saleilles, *ibid.*, p. 509.

[3] Saleilles, *ibid.*, p. 549.

[4] Binder, *Das Problem der Juristischen Persönlichkeit*, 'Rechtsfähig ist, was seiner Beschaffenheit nach in solchen Beziehungen stehen kann, die wir subjektive Rechte nennen', p. 54. Binder identifies the quality of being 'rechtsfähig', i.e. 'Rechtsfähigkeit', with personality.

remains a mere virtuality. Likewise, if there is to be a juristic capacity (*qualité juridique*), there must be some one to whom it is attributed—'a subject, a being, an entity in itself'.[1] Thus the person is not one with juristic capacity which is definable as a relation. The person is not a relation but a being, a living reality. It is a social reality so organized as to conform to the requirements of juridical order. Saleilles thus appreciates the two sides of juridical phenomena, their social side and their legal side. His theory of personality makes the legal person a living being and not a dead form.

We shall not proceed further with this account of Saleilles's theory of personality. To enter further into the subtle analyses he makes of juristic personality, particularly of the juristic personality of corporate bodies, would be either to repeat ourselves or to engage in the discussion of technical questions with which this work is not concerned. We cannot, however, end this account of Saleilles's theory, which also ends our review of modern jurisprudence, without recording the profound debt which we owe to him. Apart from the fact that the theory of corporate personality to which we have given our support is directly inspired by his theory, it is not too much to say that his writings have to a large extent inspired the profoundest reflections in this work. No writer shows a more vital sense of the realities with which the jurist is concerned. As M. Deslandres has said, 'Saleilles ne fut pas un commentateur, mais un réformateur, parce qu'il fut un social'. He was, and liked to call himself, an historical thinker, and he remains one of the greatest of modern legal historians. But he was not merely an academic thinker. History was for him a means, not an end. It opened the portals of truth by casting the light of past experience on the problems of the present, and that was why he studied it. His writings manifest the great merit which usually comes of profound historical study. It is never formal and abstract, but always in touch with the concrete realities of life. And by virtue of the loftiness of his purpose, which was always to reform and never merely to analyse and describe, he avoided the exaggerations of the scientific positivist and gave a due place to intelligence in the life of human society. He, as much as and perhaps more than any other jurist, impresses us as having synthesized the positions of the rationalist and the empiricist in his work, which, in the deepest meanings of the terms, is historical, sociological, and critical.

[1] Saleilles, *de la Personnalité juridique*, p. 509.

CONCLUSION

AS we set out to do, we have discussed the method of juristic thought side by side with problems for the solution of which it is required. This is, indeed, the only course consistent with the criticisms which we have brought against the rationalist on the one hand and the empiricist on the other. The distinction between rationalism and empiricism may be treated in more ways than one. They can be considered as philosophies which mean literally what they assert. As such we have examined them and found how they are both incapable of explaining the facts of experience. The rationalist must draw on the world of empirical fact; the empiricist must use conceptions or hypotheses. As philosophies, therefore, rationalism and empiricism are complementary aspects of the whole truth. There is, however, another way of treating their difference, namely, as a difference of emphasis. From this point of view, the value of the rationalist's work lies in its emphasis on the importance of method. But it makes the fatal error of trying to discover the true method *a priori*, without reference to the world of contingent fact. Contrasted with the work of the empiricist, it makes its appeal through its refusal to leave things as they are and through its fervent conviction that man can shape his destiny for the better. The empiricist, on the other hand, invites our respect through his insistence on the study of historical fact. His point of view is *par excellence* that of the man who prefers to face an unpleasant reality rather than abandon himself to the vain pursuit of a false dream. But at what a price! He grasps fact, only to find that it is his unbending master. His realism is but the mask of fatalism. It sees things as they are, but it must also leave them as they are. Whereas, then, the rationalist says *non est mortale quod opto*, the empiricist finds a fitting motto in the adage of Emerson—'things are in the saddle and ride mankind'. That truth and sanity lie somewhere in between the two, avoiding the bombastic claims of the former and the unconstructive pessimism of the latter, is the belief that has shaped the reflections of this work.

Nothing can be gained by repeating here the conclusions which we have reached in regard to the method and aim of juristic thought. We shall confine ourselves in the remainder of this

chapter to a concise statement of the chief conclusions to which we have come concerning the meaning of corporate personality as a juristic conception, and its bearing on the relation of law and state.

The legal personality of a corporate body is not a fiction. Nor is it created by any external power. It is as real as the legal personality of the individual human being. But this does not mean that it is a *de facto* reality patent to our simple observation. Such a view is forced to maintain the extravagant notion of a collective will and consciousness, against which critics like Duguit bring unanswerable objections. But it does not follow from this that our only course is to accept the Fiction Theory. This contention, like the theory which it challenges, errs in neglecting the conceptual element of juristic judgement, the ideal construction which the jurist puts upon the facts of social life. To treat this construction as fictitious and unreal is to condemn jurisprudence and, indeed, the whole of science as fictitious and unreal. It is only if the constructions of the jurist are made to stand for something other than juristic constructions, to explain other than juristic phenomena, that they are open to the charge of being fictions. Accordingly, the conception of corporate personality expresses a *juristic reality*, that is, a reality from the juristic point of view, nothing more and nothing less.

But again, its reality is not merely dependent upon the operation of a formal, logical dialectic. It is not a 'purely normative' or purely conceptual reality such as Kelsen holds it to be. While it is not simply descriptive of an observable fact, its reality is, nevertheless, rooted in its reference to the world of empirical fact. Its content is got from social facts, and without them it has no point of contact with things real. Thus, in studying the legal personality of corporate bodies, we are confronted by two distinct sets of problems, the one referring to the social or material side of corporate life, the other to its legal or formal side. But if these two aspects of juristic phenomena and the problems which they present can be distinguished, they cannot be cut off from each other. The formal character of legal phenomena cannot be studied apart from their social contents. Their form is the expression of their content, and a study of their content is, therefore, essential for the understanding of their true form. That is why the definition of law as a sovereign command does not touch its essence. Law is essentially a social

phenomenon, and has its foundation in the inherent character of social life. When, therefore, it is a question of determining the juristic character of certain social phenomena, the basis of any theory which we invent must be a sound knowledge of their operation as living social facts. Juristic theory must have the support of sociological theory.

Thus, when studying the juristic character of corporate bodies, we shall have to look for their sanctions in the extra-legal province of social organization, and to examine the character of their purposes in the light of a social ideal. Here again, we cannot separate these two aspects of corporate life, its actual aspect and its ideal aspect. If we cut them apart, either we produce constructions, which merely leave things as they are, and so do not effect that synthesis of social life which it is just the aim of law to achieve, or else we invent ideal systems, which it is impossible to apply, and which thus have no value for the regulation of social life. Law is always the product of actual forces and ideal considerations. It is always both a power and a value. It is, accordingly, a synthesis of actual and ideal elements. But what this synthesis will be, and how it is to be produced in any particular legal situation, it is impossible to determine *a priori*. It is conditioned by a network of practical considerations which can be appreciated only if we place ourselves in the context of historical fact. Science is general; life is particular. The synthesis of life is, therefore, to be sought only in the realm of the unique, particular experience, where we must admit the play of an intuitive consciousness as well as the discursive thought of reflective mind.

The work of a general jurisprudence is thus confined to studying the general lines on which the juristic synthesis of social life is to be achieved. It cannot itself effect that synthesis. Accordingly, all that this work has sought to do is to define the general principles of determining the juristic character of corporate life, whether it be that of the state or of any other association. The results of its investigations are these: in order to have a personality at law, a corporate body must have three elements corresponding to the three elements constitutive of a subjective right.

i. It must be an organized collectivity capable of acting as a whole in furtherance of an interest which the law will protect. This means that it must have at its service a will capable of appreciating its requirements and effecting its purpose. But this need

not be a collective will of the kind which scientific sociology cannot admit. It can be the will of an individual who is the organ of the collectivity. So far, then, as the purely subjective or material element of corporate personality is concerned, all that is required of a collectivity, if it is to be a candidate for legal personality, is that it be so organized that there is a particular will or are particular wills which can act for it, and whose acts will be honoured by its members. In introducing this subjective element of an organized collectivity as essential to the constitution of a corporate person we have broken entirely with the Fiction Theory and its complementary Concession Theory. The existence of a corporate person will not be the result of a creative act of the state. It will have its foundation in social fact and its origin in the initiative of its living members.

ii. But a mere *de facto* organization of individuals is not in itself sufficient to constitute a corporate person. The *Willenstheorie*, which would consider it sufficient, errs through neglecting the objective element of rights. In order that an organization of individuals may have legal personality, that is, be a legal right-and-duty-bearing unit, it must have a directing idea, a definite aim which gives it 'a local habitation and a name'. As Saleilles says, the collectivity must be intelligent.[1] For the law can recognize as persons only responsible beings. It can recognize rights only where it can expect the observance of correlative duties. And this is possible only when the collectivity has a definite aim which gives a finality to its purposive life, marks out its destiny, and so controls its internal and external activities.

iii. But the fact of a will pursuing an interest is not in itself sufficient to constitute a subject of rights. The fact must have a social value which calls for legal protection because it has a meaning for human life and can be realized. Thus corporate personality exists only where a collectivity has a social value by virtue of pursuing an interest worthy of legal protection in the above sense. Whether or not a particular collectivity fulfils this condition is a question of fact which cannot be answered *a priori*. It requires a study of the particular social facts which the collectivity presents. Here general jurisprudence must hand over the remaining work to historical jurisprudence, to whose studies this work is but a prolegomenon.

Law is not static. It is in its nature evolutionary and dynamic,

[1] *La Personnalité Juridique*, p. 494.

for it has its foundation in the evolutionary and dynamic process of social history. It is born of a struggle for right which is the real scene of all legal formation, and it is, therefore, in the adjustment of competing claims that its true function lies. In order to appreciate fully the realities engaged in the conflict, it is essential that we treat it not only as a conflict of competing ideas but also as a conflict of wills. This is of vital importance, since otherwise we fall into the error of rationalism, which considers legal problems as requiring for their solution merely the exercise of a formal, logical dialectic. Law is conditioned by the actual nature of the wills which impel the social machine, as well as by the normative demands of juristic idealism. Whereas it always has a moral background, because it is always an attempt at just law,[1] it is also always an empirical phenomenon, because it derives its sanction from those whom it governs. It follows that the principle of sound legislation is to effect an equilibrium between the ideal demands of the most advanced juristic idealism and the actual demands of those who grant the law its sanction.

Now the struggle for right is not one in which the parties are only individual human beings. They are also, and are more and more coming to be, the various corporate bodies in which the modern state is so rich. This is why the conception of corporate personality is of such great importance for jurisprudence. But the interpretation of it which the Fiction Theory offers is worse than useless. It supports a deliberate lie which gives us a distorted view of the realities engaged in the great struggle. It attributes a false power to the state, and would bring all other corporate bodies under a law which cannot be enforced and is in practice no better than a farce. The effect of discarding the Fiction Theory and putting in its place a theory which affirms the reality of corporate persons, in the meaning which we have given to the expression, reaches further than alterations in the juristic character of corporate bodies within the state. It implies a new conception of the state. *For it means that the corporate entity of the state cannot be separated from the corporate entities of associations within it.* They all have their foundation in the complex life of the same great community, and any modification in the one must produce a corresponding modification in the other. It is a dogmatic refusal to admit this that has led, and still leads, many jurists to maintain

[1] Cf. Stammler, *Die Lehre von dem richtigen Recht*, p. 31.

theories of state-sovereignty which no longer have any foundation in fact.

Now, if we apply the theory of corporate personality to which we have given our support, we shall treat the rights of corporate bodies other than the state no longer as conceded and derivative, but as inherent in them by reason of the place they occupy, the social function they perform, in the entire body politic. We shall treat them as capable of growth, because they are not dead forms, but living realities. Associations endowed with legal personality will no longer require a benevolent concession of the state in order to enjoy the rights essential to the fulfilment of their trusts, but will enjoy them by virtue of their inherent natures as 'respectable and responsible persons'. Their fundamental right will be to alter the formulae of their associative life in order to realize their purposes as re-defined by a maturer, more enlightened knowledge of their members.

This does not mean that Duguit is right. The state is not simply a collection of corporate bodies. We cannot dispense with a highest authority which declares the law and whose decisions are final. No legal organization can exist without an explicator of the law. The state, as a corporate person of which all other corporate persons are members, must also fulfil the first condition of having the status of a corporate person, namely, it must be so organized as to have at its service a will which can act for it and whose acts will be honoured by its members. Thus the state must remain in some sense superior to all other corporate persons. But its superiority is not that of greater over lesser force, nor is it an 'inherent superiority of will'. It is a superiority founded in and conditioned by the logic of juridically organized society. Its sovereignty is the sovereignty of its ideal purpose. Its function is, therefore, not definable as the exercise of unlimited power, but as the *superintendence* over other persons in the interests of order and justice. Its sovereignty is, accordingly, not purely formal but also material, and the law which it declares is to be judged not merely in respect of its form but in respect of its content as well. Its validity is rooted in historical fact.[1]

[1] Cf. Vinogradoff, *Common Sense in Law*, p. 147. 'They (the judges) are undoubtedly persons in authority, but their voice has a decisive weight in such questions not merely on account of this external authority, but chiefly by reason of the necessities imposed by logic, by moral and by practical considerations.'

We do not, therefore, admit Krabbe's objection to the conception of corporate or juristic personality, that it leaves authority personal and arbitrary. The objection misses its essential point. What the conception of corporate personality expresses above all else is the juristic character of the relations in which a corporate body stands to other persons. It affirms a reality which is juristic through and through, a reality which has no existence outside law. It leaves no power external to and above the law, but admits only such power as satisfies the requirements of juridical organization. As a corporate or juristic person the state cannot be independent of and indifferent to the law, but itself stands as a reality having no meaning apart from the law. For example, as a juristic person the state can be treated as responsible for the torts of its agents.[1]

Now this is so only according to the theory of corporate personality which has our support. The reason lies in its chief contention. According to the theory, the corporate person is not something distinct and apart from its living members. Law cannot recognize personality where there is not life. But neither can it enter the arena of social life without putting upon the facts it meets a form which will serve to protect public and private interests. When, therefore, it has to deal with corporate bodies, it cannot consider their legal forms apart from their social contents, and *vice versa*.

These general principles are as far as this work can go. It has attempted to enunciate certain principles of fundamental importance for determining the legal character of corporate bodies, and has examined the bearing they have on the problem of the relation of law and state. To proceed with the work of applying them to churches, trade unions, and other types of corporate bodies, would require the co-operation of historical and sociological research, which falls outside our present scope. But a word may here be said on this point, and it is simply a corollary to the foregoing conclusions. It is not suggested that such different associations as churches, trade unions, and commercial companies can be submitted to the same legal treatment. Nothing is more foreign to the views which we have put forward. We have insisted that the legal character of a corporate body is bound up with its social character, and this means that in so far as associations differ in respect of their operation as social forces they will necessarily require different

[1] Cf. Barker, 'The Rule of Law', in the *Political Quarterly*, No. 2. May, 1914.

treatments at law. For some, as we have said, the conception of corporate personality will not even be required. And where it is needed, it will still admit differences of legal structure among different corporate bodies, based upon differences in the purposes they fulfil and the positions they occupy in the community. In conclusion, it is submitted that our discussions have shown that the conception of corporate personality, or, if it be preferred, the conception of juristic personality, is indispensable to the legislator as well as to the judge; it enables him to appreciate the inherent juristic character of group life and so to perform his task truly, for legislation is not an extra-legal but a legal process. The theory of the state as a corporate or juristic person emphasizes this above all else.

BIBLIOGRAPHY

AILLET (G.). *Droit et Sociologie d'après Davy.* Revue Métaphysique et Morale. Jan.–Mar., 1923.

AUSTIN (J). *Lectures on Jurisprudence* (4th edition), vols. i–ii. London, 1873.

Province of Jurisprudence determined (3rd edition), vols. i–ii. London, 1869.

BARKER (E.). *The Rule of Law.* Political Quarterly, No. 2. May, 1914.

BATY (T.). *Vicarious Liability.* Oxford, 1916.

BERGSON (H.). *L'Évolution créatrice* (6th edition). Paris, 1910.

BESELER (G.). *Volksrecht und Juristenrecht.* Leipzig, 1843.

BINDER (J.). *Das Problem der juristischen Persönlichkeit.* Leipzig, 1907.

BOSANQUET (B.). *The Philosophical Theory of the State* (2nd edition). London, 1910.

CAIRD (E.). *The Critical Philosophy of Immanuel Kant* (2nd edition), vols. i–ii. Glasgow, 1909.

COLE (G. D. H.). *Social Theory* (3rd edition). London, 1923.

COMTE (A.). *Cours de philosophie positive* (5th edition), vols. i–vi. Paris, 1907.

CROCE (B.). *The Philosophy of the Practical.* (Transl. by D. Ainslie.) London, 1913.

What is living and what is dead in the Philosophy of Hegel. (Engl. transl. by D. Ainslie.) London, 1915.

DICEY (A. V.). *Introduction to the study of the Law of the Constitution* (8th edition). London, 1914.

Lectures on the relation between Law and Public Opinion in England during the nineteenth century. London, 1905.

DOWDALL (H. C.). *The application of Ward's psychology to the legal problem of Corporate Entity.* The Monist, January, 1926.

DUFF (P. W.). *The charitable foundations of Byzantium.* Cambridge Legal Essays. Cambridge, 1926.

DUGUIT (L.). *Law in the Modern State.* (Transl. by H. and F. Laski.) London, 1921.

Les transformations générales du droit privé depuis le code Napoléon. Paris, 1912.

L'État, le Droit objectif, et la Loi positive. Paris, 1901.

Manuel de droit constitutionnel (3rd edition). Paris, 1918.

The Law and the State. Harvard Law Review, Special Number, Nov., 1917. Camb., Mass, 1917.

Traité de droit constitutionnel (2nd edition), vols. i–ii. Paris, 1921, 1923.

DURKHEIM (E.). *De la division du travail* (3rd edition). Paris, 1911.

Les règles de la méthode sociologique. Paris, 1895.

Le Suicide. Paris, 1897.

ESMEIN (A.). *Éléments de droit constitutionnel français et comparé* (7th edition), vols. i–ii. Paris, 1921.

FIGGIS (J. N.). *Churches in the Modern State.* London, 1914.

FOLLET (M. P.). *The New State.* New York, 1912.

FREUD (S.). *Massenpsychologie und Ichanalyse.* Wien, 1921.

GELDART (W. M.). *Legal Personality.* Oxford, 1913. (Reprint from L.Q.R., vol. xxvii, 1911.)

Elements of English Law. Home University Library. (Revised edition.) London, 1914.

GÉNY (F). *Science et Technique en droit privé postif*, vols. i–iv. Paris, 1914, 1915, 1921, 1924.

GIBBON (E.). *The history of the decline and fall of the Roman Empire* (Bohn's edition), vols. i–ii.

GIDDINGS (F.U.). *The principles of Sociology.* New York and London, 1904.

GIERKE (O. von). *Das deutsche Genossenschaftsrecht*, vols. i–iv. Berlin, 1868, 1873, 1881, 1913.

Das Wesen der menschlichen Verbände. Berlin, 1902.

Die Genossenschaftstheorie. Berlin, 1887.

Johannes Althusius und die Entwickelung der naturrechtlichen Staatstheorien. Breslau, 1880.

Political Theories of the middle age. (Transl. by Maitland.) Cambridge, 1900.

GINSBERG (M.). *The Psychology of Society* (2nd edition). London, 1924.

GRAY (J.). *The nature and sources of the law.* New York, 1909.

GREEN (T. H.). *Principles of political obligation.* Oxford, 1895.

HAURIOU (M.). *La Science sociale traditionnelle.* Paris, 1896.

La Souveraineté nationale. Recueil de législation de Toulouse. 1912, 2°. série, t. viii.

La Théorie de l'institution et de la fondation. Cahiers de la Nouvelle Journée. No. 4. Paris, 1925.

Leçons sur le mouvement social. Paris, 1899.

Précis de droit administratif et de droit public (10th edition). Paris, 1921.

Principes de droit public. (1st edition) Paris, 1910. (2nd edition) Paris, 1916.

HEATH. *Personality.* Oxford, 1921.

HEGEL (G. W. F). *Sämtliche Werke.* (Edit. by George Lasson.) Leipzig, 1911.

HOBBES (T.). *Leviathan.* English works edited by Molesworth. Vols. i–xi. London, 1839–1845.

HOBHOUSE (L. T.). *Social development.* London, 1924.

The metaphysical theory of the state. London, 1918.

HUBER (E.). *Recht und Rechtsverwirklichung.* Basel, 1921.

IHERING (R. von). *Der Zweck im Recht* (5th edition), vols. i–ii. Leipzig, 1916.

Geist des Römischen Rechts auf den verschiedenen Stufen einer Entwickelung, vols. i–iii. Leipzig, 1852 ff.

Kampf ums Recht (15th edition). Wien, 1903.

Scherz und Ernst in der Jurisprudenz (8th edition). Leipzig, 1900.

JELLINEK (G.). *Allgemeine Staatslehre* (3rd edition). Berlin, 1913.
System der subjektiven öffentlichen Rechte. (1st edition) Berlin, 1892. (2nd edition) Berlin, 1905.
JENKS (E.). *Law and politics in the Middle Ages.* London, 1913.
The State and the Nation. London, 1919.
JERUSALEM (W.). *Einleitung in die Philosophie* (9th edition). Wien, 1923.
KANT (I.). *Werke.* (Ed. by Hartenstein.) Leipzig, 1834.
KELSEN (H.). *Der soziologische und juristische Staatsbegriff.* Wien, 1922.
KORKUNOV (N. M.). *General theory of Law.* (Transl. by W. G. Hastings.) Boston, Mass., 1909.
KRABBE (H.). *Die Lehre der Rechtssouveränität.* 1906.
The modern idea of the state. (Transl. by G. H. Sabine and W. J. Shepard.) New York and London, 1922.
L'Année Sociologique. (Ed. by Durkheim): vol. viii (1903–1904); vol. ix (1904–1905); vol. x (1905–1906); vol. xii (1909–1912). Paris.
LASKI (H. J.). *Authority in the modern state.* Yale, 1919.
Studies in the problem of sovereignty. Oxford, 1917.
LE BON (G.). *Psychologie des foules* (17th edition). Paris, 1912.
LINDSAY (A. D.). *Sovereignty—Aristotelian proceedings.* 1924.
L'Œuvre juridique de Raymond Saleilles. Paris, 1914.
LORD (A. R.). *Principles of politics.* Oxford, 1921.
MACIVER (R. M.) *Community* (2nd edition). London, 1920.
MCDOUGALL (W.). *An introduction to social psychology* (8th edition). London, 1914.
The Group Mind (1st edition). Cambridge, 1921.
MAITLAND (F. W.). *Collected papers.* (Edited by H. A. L. Fisher.) Vols. i–iii. Cambridge, 1911.
Gierke's political theories of the middle age. (Transl. by Maitland with translator's Introduction.) Cambridge, 1900.
MICHOUD (L.). *La théorie de la personnalité morale et son application au droit français* (1st edition), vols. i–ii. Paris, 1906.
MITTEIS (L.). *Römisches Privatrecht bis auf die Zeit Diokletians.* Leipzig, 1908.
MOMMSEN (Th.). *Corpus iuris civilis digesta.* Berlin, 1872.
OPPENHEIMER (F.). *The State.* (Engl. trans.) London, 1923.
ORR (R. L.). *Free Church of Scotland Appeals.* Edin., 1904.
PÉCAUT (F.). *Auguste Comte et Durkheim.* Revue Métaphysique et Morale. Oct.–Dec., 1921.
PLATO. *Republic.*
ROUSSEAU (J. J.). *Contrat social.*
SALEILLES (R.). *De la personnalité juridique* (2nd edition). Paris, 1922.
SALMOND (J.). *Jurisprudence* (7th edition). London, 1924.
SAVIGNY (F. C. von). *Das System des heutigen Römischen Rechts.* Berlin, 1840.
SCOTT (J. W.). *Syndicalism and philosophical realism.* London, 1919.
SIMMEL (G.). *Soziologie.* Leipzig, 1908.
Sociological Papers. London, 1905–1907.

SOHM. *Institutes of Roman law* (3rd edition). (Transl. by Ledlie.) Oxford. (14th edition) Berlin, 1911. (17th edition) Berlin, 1923.
SOREL (G.). *Reflections on violence*. (Engl. transl.) London, 1916.
SMITH (H. A.). *Law of associations*. Oxford, 1914.
SMITH (J. A.). *The economic doctrine of the concept*. Aristotelian Proceedings, 1925.
STAMMLER (R.). *Die Lehre von dem richtigen Recht*. Berlin, 1902.
Lehrbuch der Rechtsphilosophie. Berlin, 1922.
Wirtschaft und Recht nach der materialistischen Geschichtsauffassung (3rd edition). Leipzig, 1914.
TARDE (G.). *Les lois de l'imitation* (6th edition). Paris, 1911.
Les transformations du droit. Étude sociologique (6th edition). Paris, 1909.
TREITSCHKE (H. von). *Politik*. Vols. i–ii. (Cornicelius), 1897–1898.
VAUTHIER (M.). *Essais de philosophie sociale*. Bruxelles, 1912.
VINOGRADOFF (P.). *Aims and methods of jurisprudence*. Columbia Law Review, vol. xxiv, No. 1. Jan. 1924.
Common sense in law. Home University Library. London, 1913.
Juridical persons. Columbia Law Review, vol. xxiv. No. 6. June, 1924.
Outlines of Historical Jurisprudence. Vols. i–ii. Oxford, 1920, 1922.
WALLAS (G.). *Our social heritage*. London, 1921.
Human nature in politics (3rd edition). London, 1924.
WEBB (C. C. J.). *God and Personality*. Gifford Lectures. London, 1918.
WEBB (S.). *Constitution for the Socialist commonwealth of Great Britain*. London, 1920.
WENGER (L.). *Zum Zivilrecht Sowjetrusslands*. Archiv für Rechts- und Wirtschaftsphilosophie, Band 88, Heft 1. Berlin, 1926.
WINDSCHEID (B.). *Lehrbuch des Pandektenrechts* (9th edition), vols. i–iii. Frankfurt, 1906.

INDEX

Abrath *v.* North Eastern Railway Co., xliv ff.
Associations,
  distinction between incorporated and unincorporated, liii.
  germanic view of, xxxix.
Attorney-General *v.* London County Council, liii, n. 1.
Aubin, A., 107, n. 1.
Austin, J., his definition of legal sovereignty, 22, n. 2.
Austinian Theory of Sovereignty, xv, 21, 45.
  and Stammler's theory, 37, 39.
  and the Philosophical Theory of the State, 65.
  identifies sovereign with particular persons, 24.
  never been true in fact, 96.
  truth in, 26.

Barker, E., 245, n. 1.
Beck, Adolf, case of, lix.
Bergson, H., 78.
Berthélemy, on the personality of the state, 200.
Beseler, G., xxxix.
Binder, J., 237, n. 4.
Blackstone, lii, n. 1.
Boethius, his definition of person, xxiii.
Bonanza Creek Gold Mining Co. *v.* Rex, liii, n. 1.
Bosanquet, B., 60.
  aim of his theory, 63.
  basic error of his theory of the state, 66.
  cannot explain international law, 69.
  grounds for rejecting his theory of the state, 70.
  his abstract notion of individuality, 70.
  his account of the state as a moral being, 64.
  his confusing use of terms, 61.
  his difference from neo-Kantians, 64.
  his distinction between actual will and real will, 62.
  his identification of state and society, 63.
  his theory implies concessionary view of rights of corporate bodies within the state, 68.
  his theory of individuality, 63.
  identifies actual and real in his theory of the state, 64, 67.
  petitio principii in his theory of the state, 67.
  position of individual in his theory, 66.
  similarity of his theory to that of Austin, 65.
  studies and defines state as a value, 66.
Bramwell, Lord, quoted, xliv.
Brian, C. J., on corporations, xliv, n. 1.
British Empire, 183.

Caird, E., 43, n. 1.
Chevalier, M., 218, n. 1.
Churches (Scotland) Act (1905), lvii, n. 3.
Citizen's Life Assurance Co. *v.* Brown, xlvi.
Coke, xlii.
Common Law, and French and German Law, xv.
Comte, A., 75, 77.
  and jurisprudence, 79.
  his positive method, 111.
Concept, Economic Doctrine of (*vide* also Juristic Concepts), xxix, xxxi.
Concession Theory, 3, 144.
Continental Tyre & Rubber Co. *v.* Daimler Co., xlviii.
Cornford *v.* Carlton Bank, xlviii.
Corporate Personality,
  conception of, in English law, xli.
  criterion for determining the existence of, 241 ff.
  history of conception of, xxxviii ff.
  in what sense real, 240.
  problem of, 240.
  problem of, bound up with problem of sovereignty, 28.
  theory of reality of, 139 ff.
Corporations,
  elements of, 59.
  their criminal liability in English law, li ff.
  their tortious liability in English law, li.
Cory Bros. & Co. Ltd., the Case of, li, n. 1.
Criminal Justice Act (1925), li, n. 1.
Croce, B., 68, n. 2, 72, n. 1.
Crown, the Liability of, lix.

Declaration of Rights (1789), 80.
Deslandres, on Saleilles, 238.
Dicey, A. V.,
  criticism of his theory of legal sovereignty, 20.
  defends Austinian theory of sovereignty, 16.
  differs from Austin, 17.
  his account of corporations within the state as non-sovereign law-making bodies, 22.
  his distinction between actual and legal sovereign, 18.
  his distinction between legal and political fact, 18.
  his interpretation of English constitution, 22.
  his theory of legal sovereignty, 15.
  his theory one of absolute sovereignty, 18.
  his rationalism, 15.
  his view of jurisprudence, 16.
Duff, P. W., 5, n. 2.
Duguit, L., 24, n. 1, 25, 106, n. 3, 171, n. 3.
  and Bergson, 78.
  and conception of natural law, 90.
  criticism of his theory of associations, 91 ff., 101 ff.
  criticism of his theory of *droit objectif*, 82 ff.
  does not do justice to his distinction between governors and governed, 103.
  does not distinguish between material force and political power, 96.
  identifies sovereignty and public power, 103.
  ignores individual initiative and sense of responsibility, 98.
  materialistic character of his jurisprudence, 82.
  on associations, 89.
  on human purposes as content of laws, 88.
  on public law and private law, 86.
  on social solidarity, 81.
  his abstract conception of law, 92.
  his adherence to Comte, 77.
  his dogmatic empiricism, 102.
  his *droit objectif*, 81.
  his emphasis on the social sanction of law, 84.
  his failure to appreciate normative character of social facts, 94.
  his fatalism, 79.
  his identification of sociology and jurisprudence, 109.
  his identification of state with governors, 87.
  his individualism, 83, 85.
  his inconsistency as a realist, 244.
  his materialistic interpretation of social sanction of law, 96.
  his opposition to conception of corporate personality, 78.
  his opposition to metaphysics, 76.
  his point of view contrasted with that of neo-Kantians, 84.
  his real aim, 91.
  his realism, 75.
  his *service publique*, 101.
  his syndicalism, 94.
  his theory of *droit objectif* leads to doctrine of *laissez-faire*, 93.
  his theory of the function, 103.
  his theory of the organ, 103.
  his theory of the state as a collection of public services, 91.
Durkheim, E.,
  a Comtian in method, 112.
  a confirmed positivist, 114.
  a pragmatist, 116.
  a syndicalist, 113.
  his collectivism, 112.
  his one-sidedness, 113, 114.
  insists on specificity of social fact, 111.
  maintains reality of collective consciousness, 113.
  on law and morality, 115.
  on science, 115.
  sacrifices individual freedom, 113.

Emerson, R. W., 239.
Empiricism, 239.
Esmein, A., 82.

Farwell, L. J., on trade unions, liii, n. 2.
Fiction Theory, 144.
  controversy about, 3.
  effect of, on distinction between public and private law, 11.
  illustrations of, when applied, xlii ff.
  implications of, xliv.
  its consequences in private law, 7.
  its consequences in public law, 10.
  its distortion of facts, 19.
  its entry into English law, xl.
Figgis, J. N., lviii, n. 2.
Fiscus, 13.
FitzGerald, Lord, on corporations, xlvi.
Free Church Case, lv ff.
French Law and Concession Theory, 11, n. 3.

Freud, S.,
his account of the psychological basis of group life, 120.
his difference from Le Bon, 120.
his distinction between individual and social psychology, 119.
his theory of the *libido*, 119.

Geldart, W. M., xvii, lxii, n. 2.
on conception of legal personality, 222.
Genossenschaft, xxxix.
Genossenschaftstheorie, 140 ff.
Gény, F., 170, n. 1.
on Duguit, 76, 218, n. 1.
on Hauriou's jurisprudence, 227.
on Michoud, 233, n. 1.
Gesammte Hand, principle of the, 140.
Giddings, F. U., his 'consciousness of kind', 123.
Gierke, O. von,
and Concession Theory, 149.
adheres to *Willenstheorie*, 153.
aims at the ideal of a *Rechtsstaat*, 148.
character of his juridical work, 151, 155.
confuses social and juridical facts, 162, 164.
contributions of his jurisprudence, 150.
his adherence to *Willenstheorie* drives him into a rationalistic point of view, 156, 159 ff.
his assimilation of corporate to individual personality, 146.
his dualistic treatment of ends and means, 159.
his interest in the social basis of law, 152.
his point of view analytic, 160.
his starting-point psychological, 156.
his theory of the state and the Hegelian theory, 146, 157, 167.
Jellinek's criticism of, 192.
maintains reality of corporate persons, 140 ff.
makes superintendence the function of the state, 149.
on contractual basis of corporations, 143, 150.
on corporate will, 143.
on difference between state and other corporate bodies, 147.
on Fiction Theory, xxxix, 6, n. 3, 140, 145.
on foundations of corporations, 144.
on organic life of corporations, 145.
on organic character of the state, 150.
on relation of law and corporate bodies within the state, 147.
on relation of law and state, 147.
on sovereignty and corporate freedom, 150.
on special rights of corporate bodies, 144.
on *Sozialrecht*, 144.
Gray, J., xli, n. 1.
Green, T. H., 71, n. 3.
Group Personality, untenable as a philosophical conception, xxiii, xxxvii.

Hauriou, M., 82.
differs from Durkheim as to province and method of sociology, 217.
his analysis of society into its subjective and objective elements, 219.
his confusion of scientific and juristic accounts of the institution, 230.
his criticism of Duguit, 219.
his criticism of the *Willenstheorie*, 225.
his definition of the institution, 221.
his hypothesis of discontinuity in nature, 221.
his juristic point of view, 219.
his pluralism, 217.
his replies to objections raised against the conception of corporate personality, 224.
his theory of corporate personality, 222, 230.
his theory of national sovereignty, 228.
his theory of the institution, 220 ff.
his theory that rights are born only of action, 225.
his *vitalisme sociale*, 219.
puts notion of *communion en l'idée* in place of Durkheim's *conscience collective*, 223.
value of his theory of the institution for the jurist, 227, 229.
Heath, 71, n. 3.
Hegel, G. W. F., 60.
on the state, 69, n. 2.
on international law, 69, n. 3.
Hegelianism and Pragmatism, 67.
Hegelian Theory of the State (*vide* also Bosanquet).
applies philosophical conception of the absolute to the state, 65.
a theory of state-absolutism, 68.
difficulties of, 61.
its claims, 60.

Hegelian Theory of the State (*contd.*)
reasons for discussing it in connexion with rationalistic theories, 60, 72.
Historical School of Law, 4.
Hobbes, T., his distinction between natural and civil condition of man, 97.
Hobhouse, L. T., 67, n. 3, 114, n. 1, 230, n. 1.
his point of view teleological, 127.
on social evolution, 70, n. 2.
on social unity, 126.
Höffding, H., 107.
Holy Roman Empire, 183.

Ihering, R. von, 34, 35, n. 2, 82, n. 4, 196, n. 1.
and Stammler, 180.
arch-critic of the *Willenstheorie*, 168.
cannot avoid Concession Theory, 178.
essentially a fictionist, 172.
failed to appreciate meaning in ascription of personality to corporate bodies at law, 174.
his aim, 168, 170.
his conception of the struggle for right, 169.
his definition of rights does not supply an evolutionary conception of them, 177.
his distinction between objective and subjective law, 171.
his exclusion of the will from definition of rights, 170.
his great error, 170, 182.
his historical position, 169.
his jurisprudence individualistic, 172.
his theory of auto-limitation, 179.
his theory of rights as 'legally protected interests', 170.
his theory of the reflex action of law, 171.
his theory of the state, 178.
made sociology a science of purposes, 170.
on basis of law, 108.
on problem of corporate personality, 171 ff.
Individual,
and the state, xiv.
antinomy of, and society, xx ff.
Individualism, xxi.
Individualism of 1789, 167.
Institution (*vide* Association).

Jacobi, 36.
James, W., 76.
Jellinek, G., 23, n. 2.
aim of his jurisprudence, 190.
did not remain consistent with his views on the method of juristic inquiry, 195.
distinguished between jurisprudence and sociology, 192.
fell into position of orthodox rationalist in his theory of the state, 199.
formalism of his theory, 196.
held inherence of power to be the peculiar attribute of the state *qua* corporate person, 195.
his criticism of Gierke, 193.
his definition of subjective rights, 191.
his theory of auto-limitation, 197.
his theory of corporate personality not that of Gierke, 193.
his theory of public law, 192 ff.
his use of the conception of corporate personality, 193.
his work essentially a critical commentary on that of Ihering, 189.
made the state the creator of law, 197.
not a fictionist, 194.
on international law, 198.
on the nature of corporate persons, 194 ff.
on the nature of juristic judgements, 193.
on sovereignty, 195.
origins of his rationalistic theory, 199.
Jerusalem, W., 106, n. 1.
Jurisprudence,
aim of, 13, 44.
and political problems, 15.
and social psychology, 70, 207.
and sociology, 106, 107.
and the special social sciences, 107.
encyclopaedic character of, lxii.
importance of method in, 49.
its function, xxxv.
its interest in social life, xxxv, 46.
its normative character, 59.
limits of a general, 360.
social facts with which it deals, 95.
Juristic Concepts,
nature of, xxxi ff.
theories of the nature of, discussed, xxviii ff.
Juristic Personality (*vide* Personality and Corporate Personality).
Jurists, English and Continental, xv, xvi, xxvii.

Kant, I., 29.
his theory of freedom, 42.
objections to his theory of freedom, 43.
on formal principles of logical thought, 57.
Kantian Jurisprudence, 29 ff.
its confusion of moral and juristic issues, 43.
its rationalism, 35.
results of criticism of, 60.
Kelsen, H., 23, n. 1, 36, 198.
aim of his jurisprudence, 51.
and Krabbe, 209.
and Stammler, 31.
his criticism of Stammler, 52.
his criticism of theory of natural law, 50.
his definition of state as organization of legal norms, 52.
his inconsistency in using conception of personality, 54.
his jurisprudence supplies merely formal principles of logical thought, 58.
his 'purely normative point of view', 59.
his rationalism, 53.
his recognition of empirical character of positive laws, 57.
his theory cannot account for facts of juridical organization, 56.
his theory leads to centralization of legal values, 56.
his theory of the identity of law and state, 51.
his use of conception of corporate personality, 53.
on Social Contract Theory, 51.
Korkunov, N. H., 163, n. 1.
his advance on Ihering, 186.
his criticism of Ihering's theory of legal rights, 186.
his definition of rights as 'legally protected interests', 186.
not free from rationalistic bias, 187.
Krabbe, H., 25, n. 1, 80, 179, n. 1, 198.
claims support of psychology for his theory of legal sovereignty, 207.
contribution of his jurisprudence, 207.
his antithesis of the personal and the impersonal, 201, 215.
his confusion of social and juridical issues, 209.
his criticism of Duguit, 210.
his difference from the neo-Kantians, 205.
his exclusion of the will from the content of law, 202, 204.
his incomplete appreciation of social facts, 212.
his opposition to the conception of corporate personality, 203.
his opposition to the conception of state-sovereignty, 201.
his point of view as a jurist, 201.
his theory of the sovereignty of law, 206.
his theory of the state, 210 ff.
his theory of the state cannot avoid the Concession Theory, 211.
makes a 'feeling of right' foundation of binding force of law, 204.
on German theory of the state, 205.
treats rules of law as precipitate from democratic evaluation of competing interests, 206.

Laski, H., 87, n. 2.
Law,
and morality, 362.
and politics, xiv, 13 ff.
and society, 99, 106.
distinction between form and content of, 44.
distinction between public and private, 10.
extra-legal sanctions of, 59.
generality of, 88, 175.
its evolutionary character, 242.
its imperative character, 24.
its practical aim, 45.
problems of, social, lxii.
sanctions of, 96, 97.
scope of, xxxiv, lviii, 107.
Le Bon, G.,
his conception of the group-soul, 119.
his theories, analyses of primary psychological processes, 119.
narrowness of his outlook, 119.
Legal Philosophy (*vide* Jurisprudence), lxi.
Legislation, a legal process.
Limpus *v.* London General Omnibus Co., xliv, n. 3.
Lindley, Lord, on corporations, xlvii.
Lindsay, A. D., 25.
Local Government, 183.
Lord, A. R., 71, n. 3.

McDougall, W.,
his conception of the group-mind, 121.
his confusion of social psychology and sociology, 122.
on egoistic and altruistic sentiments 121.
on province of group psychology, 120.

Maciver, R. N., 71, n. 3.
his sociological hypothesis, 125.
his theory appreciates both individual and social aspects of group life, 125.
Macnaghten, Lord, lvi.
Maitland, F. W., xvi, lxi.
on Fiction Theory, xl, n. 2.
on Free Church Case, lvii.
on Gierke's *Genossenschaftstheorie*, 140.
Maund *v.* Monmouthshire Canal Co., xliv, n. 2.
Metaphors, their use in scientific thought, 54.
Michoud, L., 230, n. 2.
defect of his definition of subjective rights, 236.
his criticism of Ihering's theory of subjective rights, 234.
his criticism of the *Willenstheorie*, 234.
his definition of subjective rights, 233 ff.
on Hauriou's theory of the institution, 233, n. 3.
sociological foundations of his jurisprudence, 233.
Morality, xxiv.

Natural Law, Theory of, 50.
its place in Kantian jurisprudence, 50.
Naturrechtstheorie, 50.
Neo-Kantian Jurisprudence, 30 ff.
Nürnberger Konferenz, 143, n. 2.

Pécaut, F., 116, n. 1.
Person, history of the word, xix.
Personality,
attributes of, in philosophical sense, xxiv.
meaning of legal conception of, xxvii.
meaning of philosophical conception of, xx, xxii, xxiii.
relation of legal and philosophical conceptions of, xxxv.
Petition of Right, lix.
Philosophical Theory of the State (*vide* Bosanquet).
Philosophy, problem of, xxi, xxiv.
Piae Causae, 5, n. 2.
Politics, and law, xiv.
Positivism, 117, 122.
Positivist, the, 117.
Pragmatism, 81.
and Hegelianism, 67.
Psychology, 35, 118.

Quasi-corporations, liii.
Quo Warranto Case, lii.

Rationalism, 29 ff.
its demand for finality, 181.
Kantian and Austinian, 29.
truth in, 72.
Rechtsstaat, 91.
Representation of the People Act (no. 2) (1922), li.
Rex *v.* Poplar Borough Council, lii.
Roman Law, 3.
Rousseau, J. J., 144, n. 1.
Bosanquet's interpretation of his theory of the general will, 62.
his conception of freedom, 64, n. 3.

Sabine, G. H., 203, n. 2.
St. Paul, 220, n. 2.
Saleilles, R., 156, n. 3.
his criticism of Ihering's theory of subjective rights, 234.
his criticism of the *Willenstheorie*, 233.
his definition of subjective rights, 233 ff.
his definition of subjective rights preferable to that of Michoud, 236.
his theory of corporate personality, 237.
his theory of subjective right, 235.
on Fiction Theory, 6, n. 3.
on Roman Law, 3.
sociological foundations of his jurisprudence, 233.
value of his historical research, 233, n. 2.
Salmond, J. W., xli, n. 1.
Salomon *v.* Salomon & Co. Ltd., xliii.
Savigny, F. C. von, 189.
his account of the Fiction Theory, 6 ff.
his dogmatic jurisprudence, 4.
his historical jurisprudence, 4.
his individualistic point of view, 4.
influences of his time, 5.
his theory of associations, 6.
his theory of the state, 13.
his use of Roman texts, 6, n. 3.
on rôle of state, 12.
Shaw, Lord, lvii, n. 2.
Shepard, W. J., 203, n. 2.
Slater, Oscar, case of, lix.
Smith, H. A., liii, n. 1, liv, n. 2, lviii, n. 1, xxxi, n. 1.
Social Life, co-operative character of, 99.
Social Psychology, 118, 207.
Societies, 140, 151.
Society,
antinomy of, and individual, xx ff., 128, 130.

Society (*continued*).
criticism of organic theory of, xxiii.
nature of, xxiv.
psychological basis of, 130.
Sociological Jurisprudence, 76.
Sociology, 75.
and jurisprudence, 106, 107.
its aim, 107.
its data, 114.
its hypothesis at present necessarily dualistic, 123.
its immaturity, 107.
its scope, 110, 124.
lacks suitable hypothesis, 123.
problem of, 131.
relative finality of its theories, 129.
teleological interest of, 117–18, 122.
Sohm, R., 11, n. 2.
Sorel, G., 96.
Sovereignty, Conception of, 23 ff., 189.
an essential aspect of juridical organization, 27.
Soviet Russia, law of, 7, n. 2.
Stammler, R., 23, n. 1.
and Austin, 39.
and Ihering, 34.
and Kelsen, 31.
cannot avoid Concession Theory, 41.
confuses moral and juristic issues, 45.
formal character of his jurisprudence, 45.
his advance on Austinian jurisprudence, 38.
his conception of natural law with variable content, 90.
his conception of the legal will, 39.
his debt to Kant, 42.
his definition of the state, 42.
his inconsistency in retaining an empirical reality as necessary content of law, 48.
his theory of law as presupposition of the state, 32 ff.
his theory of sovereignty, 37.
his theory of the state has same consequences as Austinian theory, 39.
State,
function of, that of superintendence, 244.
its sovereignty rooted in historical fact, 244.
modern attack on, xiii.
theory of, bound up with theory of associations, 27.
Struggle for Right, xxvi.
Ihering's conception of, 169.
nature of, 243.
parties engaged in, 243.
Subjective Right, conception of, indispensable to law, 100.
Substantia, xx.
Sutton's Hospital Case, xlii.
Syndicalism, xiii, 92, 96, 101, 137.

Taff Vale Rail. Co. *v.* Amal. Soc. of Rail. Servants, liii, n. 2.
Tarde, G., 118, n. 3.
cannot explain heterogeneity of social types, 119.
his social theory too simple, 118.
on imitative instinct, 118.
Trade Disputes and Trade Unions Act (1927), 183, n. 1.
Trades Disputes Act (1906), liii, n. 2.
Trade Unions, 183.
their position under English law, liii.
Treitschke, H. von, 178, n. 1.
Trust, Doctrine of the, liv.
Twelve Tables, 5.

Ulpian, on public and private law, 10.
Ultra Vires, Doctrine of, xlvi, 8.
Universitas, 140, 151.

Vacher *v.* London Society of Compositors, liii, n. 2.
Value, Notion of, 66.
Vauthier, M., 106, n. 2, 118, n. 1.
Vinogradoff, P., 109, 169, n. 2, 232, n. 1.
on Austin, 30, n. 1.
on sociology, 110.

Webb, C. C. J., xx, n. 1.
Wenger, L., 7, n. 2.
Willenstheorie, 153, 167.
Windscheid, B., 40, n. 4, 189.

PRINTED IN GREAT BRITAIN AT THE UNIVERSITY PRESS, OXFORD
BY JOHN JOHNSON, PRINTER TO THE UNIVERSITY

Date Due

FEB 13 1980
AUG 31 1981
DEC 15 1980
DEC 15 1981
AUG 13 1981
AUG 13 1981

CAT. NO. 23 233 PRINTED IN U.S.A.

K 656 .H355 1971
Hallis, Frederick, 1901-
Corporate personality, microf
010101 000
0 1163 0204245 6
TRENT UNIVERSITY

K656 .H355 1971
Hallis, Frederick
Corporate personality, a study in jurisprudence

DATE	ISSUED TO181888

181888